



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HDI



HL 4ECU C



HARVARD LAW LIBRARY

Received OCT 1 1923

MONTGOMERY COUNTY

LAW REPORTER

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY

FOR THE YEAR 1922

Vol. XXXVIII

REPORTED BY N. P. FEGLEY
of Montgomery County Bar

NORRISTOWN, PA.
1922

OCT 1 1923.

TABLE OF CONTENTS

| | Page |
|---|---------|
| Academy P. E. Church of Phila., Monaghan vs..... | 128 |
| Academy P. E. Church of Phila., Townsend vs..... | 125 |
| American Railway Express Co., McClure vs..... | 186 |
| Arbuckle-Gordon Co., vs. Estate of Bertha A. Winkler | 168 |
| Balthaser, Kastle, vs. | 365 |
| Balthaser vs. Kastle | 365 |
| Baker, Story and Clark Piano Co. vs..... | 265 |
| Barker vs. Trustees Bryn Mawr College, et al..... | 49 |
| Bodey, Harris vs. | 203 |
| Borough of Jenkintown vs. Phila. Rapid Transit Co. | 121 |
| Borough of Norristown, et al., in re Norristown Pas- senger Railway Co. vs. | 321 |
| Borough of Norristown vs. Reading Transit & Light Co., et al. | 212 |
| Borough of Jenkintown vs. Philadelphia Rapid Transit Co. | 239 |
| Borough of Norristown vs. Norristown Passenger Railway Company, et al. | 245 |
| Bower et al. Mowrer, et al. vs. | 275-284 |
| Browne, Sarah Stryker, Estate of | 26 |
| Bryn Mawr College, Trustee of et al., Barker vs.... | 49 |
| Buck, William J., Estate of | 104 |
| Burdan, etc., Hirsch, etc., vs. | 349 |
| Cantanzariti, Commonwealth vs. | 171 |
| Commonwealth vs. Cantanzariti | 171 |
| Commonwealth ex rel. Goldstein vs. McKenty..... | 206 |
| Commonwealth vs. Mikula | 115 |
| Commonwealth vs. Petck | 119 |
| County Bridge, in re erection of..... | 291-339 |
| County Bridge between Norristown and Bridgeport, in re | 339 |
| Craft, J. Watson, Estate of | 37 |
| Davis vs. Pinson | 252 |

| | Page |
|--|---------|
| De Angelis vs. American Railway Express Co..... | 160 |
| Dembowski, Katharine, Estate of | 9 |
| Estate of Sarah Stryker Browne, deceased..... | 26 |
| Estate of William J. Buck, deceased | 104 |
| Estate of J. Watson Craft, deceased | 37 |
| Estate of Katharine Dembowski, deceased..... | 9 |
| Estate of John Gilmore, deceased | 108 |
| Estate of Deborah Highley, deceased..... | 22 |
| Estate of Jacobs, deceased | 14 |
| Estate of Amelia R. L. Weaver, deceased..... | 150 |
| Estate of Bertha A. Winkler, Arbuckle-Gordon Co. vs. | 166 |
| Gilmore, John, Estate of | 108 |
| Godshalk vs. Richardson | 17 |
| Gottshalk, Needs, vs. | 268 |
| Greth vs. O'Byrne | 223 |
| Griffith, Yocum, vs. | 355 |
| Haines, School District of Royersford, vs..... | 69 |
| Hallowell, Inc., vs. Kimink et ux. | 47 |
| Hansen vs. Van Lennep | 99 |
| Harris vs. Bodey | 203 |
| Heist, Moore vs. | 39 |
| Henry vs. Henry | 209 |
| Henry, Henry vs. | 209 |
| Highley, Deborah, Estate of | 22 |
| Hirsch, etc., vs. Burdan, etc. | 349 |
| Hoffman vs. Souder | 142 |
| Holland vs. Smith | 95 |
| Horning, Samuel B., Estate of | 308 |
| In re Application to remove School Directors..... | 163 |
| In re County Bridge between Norristown and Bridgeport | 291-339 |
| In re Norristown Passenger Railway Co. vs. Bor- ough of Norristown, et al. | 321 |
| Jacob, Estate of | 14 |
| James vs. James | 42 |
| James, James, vs. | 42 |
| Johnson vs. Schrawder | 144 |
| Kastle, Balthaser, vs. | 365 |

| | Page |
|---|---------|
| Kastle vs. Balthaser | 365 |
| Kimink et ux., Hallowell, Inc., vs. | 47 |
| Kleckner vs. Rash | 259 |
| Kosciuszko Stores, Inc., Wisnieski vs. | 29 |
| Lansdale, Boro. of, et al., Phila. Sub. Gas & Elect. Co. vs. | 78 |
| McClure vs. American Railway Express Co. | 186 |
| McKenty, Commonwealth ex rel. Goldstein vs. | 206 |
| Mahan vs. Pawling | 198 |
| Mikula, Commonwealth vs. | 115 |
| Miller et al., Goldfine, vs. | 301 |
| Montgomery Bus Co., Transportation Finance Co. vs. | 102 |
| Montgomery Transit Co. et al., Newall et al. vs. | 227 |
| Montgomery Transit Company, Norristown Trust Company, Trustee, vs. | 327 |
| Monaghan vs. Academy P. E. Church of Phila. | 128 |
| Mowrer et al., vs. Bower, et al. | 275-284 |
| Murray vs. Murray | 314 |
| Murray, Murray, vs. | 314 |
| Needs vs. Gottshalk | 268 |
| Newall et al. vs. Montgomery Transit Co. et al. | 227 |
| Norristown Co-Operative Association, Wagenseller, vs. | 325 |
| Norristown Transit Company, Norristown Trust Company, Trustee, vs. | 327 |
| Norristown Passenger Railway Company, et al., Borough of Norristown vs. | 245 |
| O'Bryne, Greth vs. | 223 |
| Pawling, Mahan vs. | 189 |
| Petck, Commonwealth vs. | 119 |
| Philadelphia Rapid Transit Co., Borough of Jenkin- town, vs. | 239 |
| Phila. Suburban Gas & Electric Co. vs. Boro. of Lansdale et al. | 78 |
| Rambo & Regar, Inc., vs. Regar et al. | 169 |
| Rash, Kleckner, vs. | 259 |
| Regar et al., Rambo & Regar Co., Inc., vs. | 169 |
| Richardson, Godshalk, vs. | 17 |
| Rippman, Rippman, vs. | 312 |

| | Page |
|--|------|
| Rippman, vs. Rippman | 312 |
| Roberto et al., Stern et al. vs. | 140 |
| School Directors Montgomery Township, In re Ap- plication to remove | 163 |
| School District of Royersford vs. Haines..... | 69 |
| Shaver et al. State Police, Zeigle vs. | 155 |
| Shrawder, Johnson vs. | 144 |
| Smith, Holland vs. | 95 |
| Souder, Hoffman vs. | 142 |
| Stern et al. vs. Roberto et al. | 140 |
| Story and Clark Piano Co. vs. Baker | 265 |
| Townsend vs. Academy P. E. Church of Phila. | 102 |
| Transportation Finance Co. vs. Montgomery Bus Co., Inc., et al. | 102 |
| Van Lennep, Hansen vs. | 99 |
| Weaver, Amelia R. L., Estate of | 150 |
| Wisnieski vs. Kosciuszko, Inc. | 29 |
| Zeigle vs. Shaver, et al. | 155 |

In the Orphans' Court of Montgomery County.**Estate of Katharine Dembowski, Deceased.**

Decedent died intestate, and letters of administration were granted to the accountant who filed his account, and at the audit a claim was presented for a balance alleged to be due by the decedent on account of the purchase price of real estate. Evidence was introduced showing that the claimant sold his remainder interest to the decedent, and that he had received considerable money on account of the purchase price, and that the claim presented was for unpaid balance. No evidence was presented showing how this balance was made up, nor showing that decedent ever admitted the amount claimed to be actually due by her. Testimony was introduced, showing that a compromise amount was offered by decedent, but no evidence shown that this compromise amount was ever accepted by the claimant.

An agreement of some of the heirs was introduced, showing that they agreed to pay a certain amount on account of this claim, it was held that evidence offering a compromise when the same was not accepted by claimant was not admissible, and that the agreement of some of the heirs that the Court allowed a certain amount in payment of the claim, is also not binding on the heirs who do not join in the agreement. The claim, therefore, must be disallowed as there is no evidence to sustain the same.

No. 23 Nov. Term, 1921

ADJUDICATION

H. M. Tracy, Esq., Attorney for Accountant and certain heirs.

Robert T. Petts, Esq., Attorney for Exceptant.

Opinion by Solly, P. J., Dec. 5, 1921.

Katharine Dembowski, a resident of the Borough of Conshohocken, died on the 11th day of February 1921, intestate, and letters of administration on her estate were granted to the accountant the 17th day of February 1921.

The husband of the decedent predeceased her, and she was survived by issue, the following named eleven children: Pelagia Pateracki, Joseph Pateracki, Frank Pateracki, Theophilus, Dembowski, Constance Dembowski, Harry Dembowski, Constantine Dembowski, Dominick Dembowski, Anna Skwarezewski, Clara Zalneraites and Benedict Dembowski. The last two named are in their minority and the guardian of their estates is Constance Dembowski, appointed by this court.

Vol. XXXVIII—No. 1.

MONTGOMERY COUNTY

Dembowski Estate.

The transfer inheritance tax has not been paid because of a disputed claim which is passed upon in this adjudication.

CLAIM

Reverend Benedict Tomiack made claim to the administratrix for \$4,000, which he alleged was the balance due him by the decedent for the conveyance to her by him of his remainder interest in fee in certain real estate in Conshohocken, of which she had the life interest under devise in her husband's will. He did not appear at the audit. There never was any written evidence of the nature, character or amount of the claim and of course no items to show how the amount of it was made up. He contended that his claim was a just one, and legally due at the time of decedent's death, and he relied for recovery upon admissions made by her in her life time that she was indebted to him and should be paid.

Bernard Dembowski, the husband of the decedent, by his will, which is recorded in Will Book No. 49, page 212 &c., gave the residue of his estate to his wife during her life. After her death he gave all his real estate in Conshohocken to the Reverend Benedict Tomiack in fee simple. It seems from the testimony that Dembowski in his lifetime carried on a bakery business and also was engaged in several real estate operations. Tomiack assisted him in the real estate operations with loans and advances of money, but never took any obligations, or other paper writings from Dembowski in the transactions. To repay Tomiack what he may have owed him, Dembowski, in his will, devised to him all his real estate in Conshohocken after the death of his (Dembowski's) wife, to whom he gave the residue of his estate (including the Conshohocken real estate) for the term of her life, as already stated.

After the death of her husband the widow received the proceeds of several life insurance policies carried by him, and of which she was the beneficiary. An agreement was subsequently made between Tomiack and the widow for the sale by him and the purchase by her of his remainder interest in the Conshohocken real estate. What the real consideration for the purchase and sale was does not clearly appear. On October 1, 1918 Tomiack gave the widow his receipt for \$6,500, "on account of premises 1st Ave. and Maple Street, Conshohocken." By deed dated January 27, 1919, and re-

Dembowski Estate.

corded in the office for the recording of deeds for this county in Deed Book No. 774, page 189 &c., he conveyed the said real estate to the widow. The consideration set forth in the deed is \$1. The revenue stamps affixed to the deed show the consideration was \$9,000. Afterwards the widow paid Tomiack \$1100. as shown by her cheques and his receipts. On May 10, 1920 she paid \$500; on November 12, 1920, she paid \$600. It was made to appear, therefore, that at least \$7600. was paid to Tomiack.

Theophilus Dembowski, one of the next of kin, through his counsel objected to the allowance of the claim. His contention is that the claim in the first place is vague and indefinite, and in the second place the devise of the remainder interest in the Conshohocken properties was in full settlement and payment of all claims Tomiack had against Dembowski, and the devise was so accepted by him. The last reason might be a good one, if Tomiack was making claim against the Bernard Dembowski Estate. The claim is against the widow's estate for balance of the purchase money for his conveyance to her of his right, title and interest as remainderman in Conshohocken real estate of which she was life tenant under her husband's will. The entire testimony in support of the claim relates to admissions made by the decedent in her lifetime, which as will be seen later on, are not such as will sustain recovery. Pelagia Pateracki, one of the children of the decedent, testified that in November 1920, while she was on a visit home, she and her mother conversed several times over the claim that Tomiack made upon her for a balance of \$4000, as due and owing him for his conveyance of the Conshohocken real estate to her. Tomiack was not present at any of the conversations. The mother told her she owed him but \$2000, and she wanted to give him that much. The daughter, when asked it was the balance of a debt her mother wanted to pay Tomiack answered, yes. There was further testimony of the witness to the effect that her mother stated Tomiack claimed \$4000., which would include interest on advancements to the husband, and she would pay him \$2000. which would cover all back interest.

Constance Dembowski, another daughter, (who seems to have been the child who attended to her mother's business affairs), testified that she was present when a conversation took place between

Dembowski Estate.

Tomiack and her mother about the amount due him for interest on the money representing the consideration for the interest in the Conshohocken property he had sold her. At that time (date not shown) her mother stated she was willing to pay \$2000. in settlement. There were other conversations to the same effect. At times Tomiack claimed there was owing him \$4000. According to the witness her mother was perfectly willing to pay him \$2000. in settlement. There were other conversations to the same effect. At these times Tomiack claimed there was owing him \$4000. According to the witness her mother was perfectly willing to pay him \$2000. in settlement of all claims against the Conshohocken property. The day the mother died she had been stricken in church where she was with the daughter, Constance. She was removed to the rectory. She died about twenty minutes after being fatally stricken. She wanted to make a will. It was too late to do so, so she told her daughter, "don't forget to pay Father Tomiack the two thousand dollars."

The testimony of these two witnesses established first; that the claimant sold his remainder interest in the Conshohocken real estate to the decedent; that he received from her \$7600. on account of the purchase money; that he afterwards claimed there was due him an unpaid balance of \$4000; that the decedent was willing to pay him \$2000. and directed that amount to be paid him when she was dying.

The case as presented is an unusual one, in that the claimant who is not a competent witness, to prove his claim, not only failed to appear at the audit, but also failed to produce any evidence showing how he made up the amount of the claim, or that the decedent's offer to compromise and settle the claim by the payment of \$2000. had been accepted by him. He did, however, produce and offer in evidence the agreement of seven of the eleven children that \$2500. was due and owing him, and one eleventh thereof should be deducted from each of their distributive shares of the fund here for distribution. Of course that agreement neither established the claim against the estate so far as regards the other four children, nor binds them in any way. It simply obligates them in good conscience to pay the claimant out of their shares seven elevenths of \$2500. Two of the children who have not joined in the agreement are minors. One of

Dembowski Estate.

the other two children who have not joined is the son who objected to the claim, and the attitude of the remaining one is unknown.

The admissions of the decedent concerning the claim of Tom-iack and her willingness to pay \$2000. in settlement and compromise, not accepted by him, were not admissible, and the testimony of the two daughters should not have been received. There is, therefore, no evidence to sustain the claim. An offer to compromise a disputed claim can never be used as evidence against the party who made it. *Pirhilla v. Duquesne Borough*, 47 Pa. Sup. Ct. 330, where it was said, "To entitle an offer to compromise to be received in evidence, it must be shown that it was accepted, and unless so shown it is not binding on either party. It does not operate as an admission of liability, and the rights of the parties are not affected, but remain precisely as they were before the offer was made. We have abundant authority for holding that, as to an offer to compromise of a disputed claim, nothing is better settled than that such an offer, not accepted, should never be used as evidence against the party who made it." This principle governs the case at bar. It is unnecessary to cite the numerous authorities to the same effect. We may note, *Slocum v. Perkins*, 3 S. & R. 295; *Arthur v. James*, 28 Pa. 236; *Bascom v. Danville Stove Co.*, 182 Pa. 427; *Fisher v. Life Association*, 188 Pa. 1; *Green & Sons v. Bauer*, 15 Pa. Sup. Ct. 372; *Koons v. Swartz*, 47 Pa. Sup. Ct. 217; *Parkinson vs. Parkinson*, 61 Pa. Sup. Ct. 278.

The ascertained balance, less transfer inheritance tax, is awarded in equal shares to the eleven children of the deceased.

The account, petition for distribution and notes of proceedings are hereto attached.

The account is confirmed .

AND NOW, December 5, 1921, this adjudication is confirmed NISI. If no exceptions are filed within the time fixed by the rule of court, counsel for accountant will prepare a schedule of distribution and certify that it is in conformity with this adjudication; if and when approved by the court it is to be attached hereto and form part hereof; and Pelagia Pateracki, administratrix as aforesaid, will pay the distributions herein awarded.

In the Orphans' Court of Philadelphia County.

JACOBS' ESTATE

Under Section 2 of the Intestate Act of June 7, 1917

1st. Costs of Appraisement and setting apart of the special allowance of \$5,000 to the surviving spouse, are part of the costs of the administration of the estate and payable thereout.

2nd. Where there is a partial intestacy, i. e. intestacy as to the surviving spouse, nothing contained in the will can affect in any way the rights of the surviving spouse under the Intestate Laws, and not until after those rights are adjusted, do any of the provisions of the Will become operative.

3rd. Where appraisers set apart securities to the value of \$5,000 selected by the surviving spouse, at a sum in excess of that at which they were valued by the Estate appraisers, it is an accretion and the accountant should be charged with the excess as though he had sold the securities at that price.

Exceptions to Adjudication.

No. 36, July Term, 1921.

The auditing Judge found that the decedent married after the execution of the Will and Codicil, and that the surviving spouse was therefore entitled to share in the estate under the Intestate Laws.

That under the Appraisement of securities selected by the surviving spouse, there was an enhancement of \$685 over and above the figures at which they were appraised for the purposes of administration, and that for purposes of distribution the accountant should be charged therewith.

The surviving spouse paid, and requested an allowance therefor, of \$22.25, being the costs of the Clerk, O. C., appraisers' fees and affidavits in the proceeding to value and set apart property to the value of \$5,000.

This claim was disallowed, the auditing Judge holding that they should be borne by the surviving spouse individually.

Exceptions were filed by the accountant on behalf of himself as such, and himself and others as legatees under the Will, to the effect, *inter alia*, that:—

Jacobs' Estate.

First. The pecuniary legacies contained in the Will should be first paid out of the residue over and above the \$5,000, and that the balance should then be equally divided between the surviving spouse and the residuary legatees.

Second. That accountant should not be charged with the increase in the sum at which the securities were appraised and set apart, over and above the appraisement of them by the general appraisers of the estate.

The surviving spouse, excepted to the refusal of the auditing Judge to award the sum paid out for the costs incident to the \$5,000 appraisement.

Edgar N. Black, for exceptions on part of accountant and residuary legatees.

Neville D. Tyson, for exceptions on part of surviving spouse.

Opinion, Gest, J., November 17, 1921:

The testator made his will in 1912, married in 1916, and died without issue in 1920. His widow, under Section 2 of the Intestate Act of 1917, was entitled, in addition to her exemption, to her special allowance of \$5,000, to be chosen by her from real or personal estate, or both, and in addition, to one-half part of the remaining real and personal estate. She presented her petition to the Court, in which she chose and selected certain designated securities, and asked that appraisers be appointed in order that they might be set apart for her. The appraisers having filed their appraisement of the securities so selected, amounting, with cash, to \$5,000, the appraisement was confirmed by the Court. At the audit, the widow requested that she be further allowed the sum of \$22.25 as the expenses of the appraisement, representing a ten-dollar fee to each of the appraisers and the costs of the affidavits. The Auditing Judge, however, held that these expenses were not properly chargeable to the estate, but should be paid by her individually, and dismissed her claim, and the widow has filed exceptions to this ruling. The majority of the court are of the opinion that these expenses should be considered as costs of the administration of the estate, and the exceptions of the widow are therefore sustained.

The exceptions of the accountant are without merit. The securities selected by the widow were appraised, by the appraisers appointed on her petition, in a sum greater by \$685 than the appraisement thereof made in the inventory, and the Auditing Judge in making distribution, added that sum to the balance shown by the account and awarded to the widow from the balance thus ascertained the securities, of course at the higher valuation, with some cash aggregating \$5,000, the residue being awarded one-half to the widow and one-half to the legatees under the will. The Auditing Judge could have done nothing else; as he properly said, "The widow taking these assets at \$685 more than they were appraised at for the purposes of administration, is just as if the executor had sold them at that increase, and under the circumstances the increase should appear in the account. For purposes of distribution, this accountant will be surcharged with this item of \$685."

Of course, as the testator married after making his will, he must, under Section 21 of the Wills Act of 1917, be deemed and construed to have died intestate so far as the widow is concerned; *Stestack's Est.*, 267 Pa. 115; so that as to her the will does not exist; but it remains effective as to all that remains after the legal claim of the widow is satisfied. It therefore follows that the pecuniary legacies must be paid in full from the remainder left after the award to the widow. They cannot be deducted from her share, or any part of it, although the result may be unfortunate for the residuary legatees named in the will. *Perry's Est.* 18 Phila. 124; *Bentz V. Nieman*, 6 Watts, 85. It may be remarked that the surcharge is purely technical and for the purposes of distribution only, without implying any default on the part of the accountant.

The exceptions of the accountant are dismissed, and the adjudication, modified as to the allowance of the expenses of the widow's special allowance, is confirmed absolutely.

In the Court of Common Pleas of Montgomery County.

Plaintiff brought suit against defendant, a Real Estate broker, for the balance due for work and labor done for defendant. The defendant sold the property of plaintiff and remitted check to plaintiff with an accompanying statement in which he took credit for One hundred Dollars commission of sale of real estate, and marked check "in full payment for all claims to date". Plaintiff received this check, but returned bill of the credit claimed, marked on by defendant, crossed out and showed a balance of One hundred Dollars due.

The jury returned a verdict in favor of plaintiff, whereupon the defendant moved for judgment N. O. V. alleging that the acceptance of the check with the accompanying statement was an accord and satisfaction, whereby the claim for the balance as alleged due would be barred. It is settled where a claim is unliquidated or in dispute, and the plaintiff accepts a less sum it operates as an accord and satisfaction and since the plaintiff in this case kept the check and used it, such is a bar to his claim, and judgment must be rendered in favor of the defendant.

No. 158, June Term, 1920.

Motion for judgment N. O. V.

Samuel D. Conver, Attorney for Plaintiff.

Evans, High, Dettra & Swartz, Attorneys for Defendant.

Opinion Miller, J., Jan. 9, 1922.

The plaintiff, who is a carpenter, and the defendant, who is a real estate broker, had, for a long time, had business relations and, prior to July 15, 1919, the former rendered to the latter a bill for work and labor done amounting to a total of \$243.05. it was agreed at the trial that the amount of this bill was correct; that the work had been done; and that the prices charged for it were proper. Standing alone, it was a presently due and unpaid, liquidated and undisputed claim.

It seems, however, that the defendant claimed, but plaintiff denied, that the latter was at the time indebted to him for commissions for selling a house. On July 15, 1919, he, therefore, took the bill in question, wrote on it below its total, "Credit, sale of Columbia Avenue property, \$100; balance \$143.05," and then mailed it, with his check for this balance, having written upon its face "in full payment for all claims to date," to the plaintiff, who deposited and collected the check through bank on July 17th. On the next day, after its proceeds were in his possession, the plaintiff wrote to the defendant denying the indebtedness of \$100 and stating that he was accepting the check on account. He, at the same time, returned the bill with the

Godshalk vs. Richardson.

notation of the defendant, as above set forth, crossed out by himself and with his own memorandum added to it: "July 18, on account by check \$143.05, balance \$100" and demanded payment of this balance. Such payment was refused, whereupon this suit for its recovery was brought. The trial was confined to the disputed question of fact of whether the plaintiff had owed the defendant the \$100 for his services as a broker and the verdict was in favor of the plaintiff for the full amount of his claim. We refused defendant's motion for a compulsory nonsuit and request for binding instructions in order that the question of law involved in the case might, on a motion for judgment non obstante veredicto, if the verdict was for the plaintiff, receive more mature consideration than was possible during the trial.

The real defense was, of course, that the plaintiff's retention and use of the check in question, after such positive notice that it was sent in full payment of all claims to date, constituted an accord and satisfaction, whereby his claim for the balance of his account was barred. Such would undoubtedly have been the case had plaintiff's claim been disputed, but it was not. As we view it, the exact question of law on which the case turns is, therefore, whether or not the defendant's disputed set-off or counter claim, having its origin, as is the case, in another transaction, itself made plaintiff's account such an unliquidated one as to be the subject matter of an accord and satisfaction.

It is only in the rarest of cases, where the facts are so exceptional there can be no doubt of the intention of the parties, that the payment of a portion of an existing debt can work the legal satisfaction and extinguishment of the whole of the debt. *Barry v. Caplin*, app., 73 Pa. Sup. Ct. 487. The debt must be unliquidated and disputed before it can have that effect.

1 R. C. L. 198, relying on *Tanner v. Merrill*, 108 Mich., 58, 65 N. W. 664, declares that a dispute as to the right to a set-off or counter-claim against an otherwise undisputed claim has properly been held to render the claim as a whole a disputed claim, as the claim should be treated as a single claim consisting of the undisputed part and the set-off or counter-claim. Also, see *Clark v. Summerfield Co.*, 40 R. I. 254, 100 Atl. 499; and I. C. J. 556 section 78.

Godshalk vs. Richardson.

It is true that there is a technical difference between such a case and one of a controversy as to the amount due, but the principle which governs them is the same. Whatever may be the ground of the dispute, the fact remains that there is one. *Hull v. Johnson et al.*, 46 *Atlan.* 182. Moreover, until the amount of the counterclaim is determined, it is uncertain what the defendant's debt to the plaintiff is. *Stanley-Thompson Liquor Co. v. Southern Col. Mer. Co. (Colo.)* 178 *Pac.* 577, 4 *A. L. R.* 471.

Many of the cases bearing on this question are collected in the note to the last-cited case, as it is to be found reported in 4 *A. L. R.* 471. It is there declared that, by the great weight of authority, an undisputed claim due a creditor is rendered unliquidated by the assertion by the debtor of a disputed counterclaim or set-off and suggested as a reason that such is the law that "the decisions on this point may have been influenced, to some extent at least, by dissatisfaction with the general rule that part payment of a liquidated and undisputed indebtedness furnishes no consideration for the release of the remainder of the indebtedness, and the disposition to limit that rule as narrowly as possible."

There is, however, respectable authority which is squarely in conflict with the rule just cited (1 *C. J.* 556, section 78; 4 *A. L. R.* 474), but, as stated, the great weight of authority outside of our own state, gives it support.

In quite a number of our own cases, it is to be observed that the plaintiff's account was not in dispute while the set-off claimed by the defendant was. And all seem to have been disposed of as though it were conceded that this situation gave rise to a disputed claim within the operation of the accord and satisfaction principle. See *West Point Cotton Mills v. Blythe*, app., 29 *Pa. Sup. Ct.* 642; *Phila., B. & W. R. R. Co. v. Walker*, app., 45 *Pa. Sup. Ct.* 524; and *Barry v. Caplin*, app., *supra*.

We hold, therefore, that, although the amount of the plaintiff's bill was not in controversy, the fact that, at the time when defendant sent him the check for \$143.05, the latter's deducted counterclaim or set-off was in dispute, in that the plaintiff denied liability for it, rendered the plaintiff's claim of \$243.05 unliquidated, within the contemplation of the law.

And the rule that the debtor's disputed counterclaim makes

the creditor's undisputed claim unliquidated and the subject of an accord and satisfaction is, in our opinion, not affected by the fact that the counterclaim does not grow out of the same transaction which gave rise to the plaintiff's claim. *Stanley-Thompson L. Co. v. So. Col. M. Co.*, supra. We are aware that *Cartan & Jeffrey v. Wm. Thackaberry Co.*, (Iowa), 117 N. W. 953 is directly to the contrary, and observe that the opinion in neither case contains any citation of authority to support it. We base our opinion on this branch of the case, at least to some extent, on the fact that, of the Pennsylvania cases, in *Cotton Mills v. Blythe*, app., supra, the counterclaim seems to have grown out of a transaction different from that on which the plaintiff's claim was based and the fact is not even mentioned in the opinion; and in *Phila., B. & W. R. R. Co. v. Walker*, app., supra, such was undoubtedly the case, but the plaintiff made no point of it and the question was not regarded as of sufficient importance to receive consideration.

Moreover, there does not appear to be any reason upon which to base the limitation of the application of the rule to be found in the Iowa case. If the rule itself is intended to serve as but a convenient avenue of escape from the hardship of the principle that part payment of a liquidated debt furnishes no consideration for the release of the remainder, it is not at once apparent why the counterclaim need be confined to the same transaction. And this is especially true where such counterclaim does not consist of damages ex delicto, or even arising out of breach of contract, but, as is the case here, it does consist of a matter which could have been set up by the defendant in a suit by the plaintiff on his claim.

Plaintiff's claim was, therefore, unliquidated. It is settled that where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction, (1 C. J. 551, section 71), because it is the right of one paying money to direct its appropriation and to make a payment conditional on the recognition of a claim for set-off. *Bernstein v. Hirsch*, app., 33 Pa. Sup. Ct. 87, 89; *Washington N. Gas Co. v. Johnson*, 123 Pa. 576, 593.

In order, however, to constitute an accord and satisfaction, it is necessary that the money should be offered in full satis-

Godshalk vs. Richardson.

faction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. *Bernstein v. Hirsch*, app., supra; *Societe &c. v. Loeb, et al.*, app., 239 Pa. 264.

And if one of the parties to a contract, where the amount has been liquidated, wishes to abate his claim against the creditor, it must be shown the creditor understood or should have understood that he was doing so when he received the consideration named. *Dillon's Estate*, 269 Pa. 234, 243. It then becomes the plain duty of the creditor to accept the check for the purpose for which it was offered, or to return it. *Washington N. Gas Co. v. Johnson*, supra.

It remains only to apply these principles of law to the facts before us. The bill, with the deduction noted on it, was sent to the plaintiff together with the check for the balance marked "in full payment for all claims to date." The notice that the payment was intended to be in full was positive and clear. It then became the plain duty of the plaintiff to accept the check for the purpose for which it was offered, or to return it. He elected to do the former, kept the check and collected it through bank. This all was done before the letter of July 18th was written.

It was then, and is now, too late to escape the effect of his own action. The accord had been fully executed. It had been followed by satisfaction. Action on the original claim was thereby barred.

AND NOW, ninth January, 1922, the motion is entertained and, for the reasons stated, is allowed, and the prothonotary is ordered to enter judgment in favor of the defendant and against the plaintiff non obstante veredicto.

In the Orphans' Court of Montgomery County.

Estate of Deborah Highley, deceased.

Decedent died leaving a will, wherein she gave to A. a life estate, and at A.'s death or marriage the balance should be distributed among her brothers and sisters if living, and the children of any who may be deceased per stirpes. A. died whereupon the heirs of A. consisted of children of brothers and sisters and three grand children, being children of deceased children. The question is whether the grand children of the deceased brothers and sisters take under the will, unless there is a clear expression and intent of testatrix that grand nieces or grand nephews are to take, they fall within a class which are excluded under the meaning of children, therefore, as there is no expression in the said will to show that the grand children were to take, they are excluded from sharing in the distribution of the trust funds, and only the children of deceased brothers and sisters take.

No. 20, November Term, 1920.

Adjudication.

Muscoe M. Gibson, Esq., Attorney for Accountant.

Opinion by Solly P. J., Dec. 5, 1921.

Estate of Deborah Highley, deceased.

Will—Interpretation of—grand nieces or grand nephews right to inherit.

Deborah Highley, a resident of the Borough of Norristown, died on the 16th day of April, 1896, having made her last will and testament in writing bearing date the 10th day of January, 1894, duly probated the 1st day of May, 1896, on which letters testamentary were granted to Mary P. Highley, who was appointed sole executrix. She died on the 25th day of March, 1921, leaving a last will and testament in writing, which was admitted to probate the 13th day of April, 1921, and on which letters testamentary were granted to Annie Corson Way.

The said Deborah Highley was unmarried and had no issue. She was survived by three brothers and two sisters, namely, Henry Highley, Hannah Highley Corson, Thomas Highley, Felix F. Highley, and the said Mary P. Highley.

At the time of her death the testatrix was possessed of personal estate consisting, inter alia, of certain stocks.

The account was filed the 4th day of October, 1921, showing a balance for distribution amounting to \$1,836.59.

No claims were presented, and it was represented that all the debts of the decedent which came to the knowledge of the accountant have been paid.

Highley's Estate.

The collateral inheritance tax has not been paid. The amount due is directed to be paid by this accountant, and will be deducted in the schedule of distribution.

The will of the testatrix reads as follows: "I give, devise and bequeath unto my beloved sister, Mary P. Highley, the use, occupancy and income of all my real and personal estate during her life, and maidenhood, and after her death or marriage, my will is that all my estate shall be divided with her among my brothers, if living, and the children of those of my brothers and sisters who may be deceased per stirpes." The sister was given the income and occupancy of the whole estate during her life, if she remained unmarried, and at her death or remarriage, when either event happened, the state was to be divided among the then living brothers, if any, and the children of brothers and sisters then dead, per stirpes, that is by representation, the children to take the share of their parent among them equally.

That is the plain and unmistakable meaning of the language of the dispositive clause of the will. The persons entitled to the estate in remainder were to be ascertained as of the date of the marriage or the death of the life tenant. The time fixed for the vesting of the remainder estate was the happening of either of these events, and the brothers of the testatrix, who survived the life tenant, and the children of deceased brothers and sisters were to take.

No brother of the testatrix survived the life tenant. All her brothers and sisters were then dead. The children of some of them were then and are still living. The testatrix had three brothers, Henry Highley, Thomas Highley, and Felix F. Highley, and two sisters, Hannah Highley Corson, and the said Mary P. Highley. Henry Highley left no children him surviving. He died in the year 1917, leaving his widow, who is living, but who obviously is not entitled to any share of the estate. Thomas Highley left two children, Howard Highley and Anna Laura Highley, both living and of full age. Felix F. Highley left five children, Dr. George N. Highley, Charles C. Highley, Sarah Highley Holstein, Nancy P. Highley, and Ione B. Everett. The first four named are living and of full age. Ione B. Everett

Highley's Estate.

died in the year 1919, (when the life tenant was living) leaving surviving one child, Henry Lawrence Everett, Jr., who is living and of full age. Hannah Highley Corson left two children, Annie Corson Way, who is living and of full age, and Charles Corson, who died while the life tenant was living, leaving two children, Susan Corson Ruff and Mabel Corson Jaco, both living and of full age.

There is no question that those children of the deceased brothers and sisters of the testatrix, who survived the life tenant, all of whom are now living, are entitled to distributive shares of the fund for distribution. Are the grandchildren of deceased brothers and sisters entitled to participate in the distribution? These grandchildren are Susan Corson Ruff, Mabel Corson Jaco, and Henry Lawrence Everett, Jr. They are not unless necessity required the sense of the word "children," as used by the testatrix, to be extended beyond its natural import, or if the testatrix has clearly shown by other words that she intended to use the word or term in a more extended sense, so as to include grandchildren. It is not necessary to extend the actual meaning of the word "children" as employed by the testatrix to carry out her will. There is not a word in the will to show any intention whatever that "children" was to include grandchildren or issue. Doubtless, if the testatrix had meant the children or issue of deceased children of brothers and sisters, in other words, grand-nieces and grand-nephews, to take, she would have so indicated by some expression. We cannot suppose intent, or supply words or phrases to show intent. We must take the will as it is written, and distribute the estate to those entitled by the plain meaning of the language of it.

The right of grandchildren to take under the designation of children is recognized, and the rule may be thus fairly stated: Under a bequest to children, grandchildren and other remote issue are excluded unless it be the apparent intention of the testator, declared by his will, to provide for the children of a deceased child. But such construction can only arise from a clear intention or necessary implication, as where there are not other children than grandchildren, or where the term "children" is further explained by a limitation over in default of

Highley's Estate,

issue. The word "children" does not ordinarily and properly speaking, comprehend grandchildren, or issue generally. Their being included in that term is only permitted in two cases, viz.: from utter necessity, which occurs when the will would remain inoperative unless the sense of the word "children" were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend to use the term "children" in the proper actual meaning, but in a more extended sense. *Dickinson v. Lee*, 4 Watts, 82; *Hallowell v. Phipps*, 2 Wharton, 376; *Horwitz v. Norris*, 49 Pa. 213; *Castner's Appeal*, 88 Pa. 478; *Hunt's Estate*, 133 Pa. 260; *Steinmetz's Estate*, 194 Pa. 611; *Harrison's Estate*, 202 Pa. 331; *Page's Estate*, 227 Pa. 288; *Campbell's Estate*, 202 Pa. 459; *Scully's Estate*, 249 Pa. 52; *Putenbaugh's Estate*, 261 Pa. 235; *McGlensy's Estate*, 37 Pa. Sup. Ct. 514; *Long's Estate*, 39 Pa. 323. This rule has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms. *Hunt's Estate*, supra.

Susan Corson Ruff, Mabel Corson Jaco, and Henry Lawrence Everett, Jr., are not entitled to any shares of the fund. The balance in the accountant's hands, less collateral transfer inheritance tax, is divided into three shares. One share is awarded to Annie Corson Way; one share is awarded to Howard Highley and Anna Laura Highley; and one share to Dr. George N. Highley, Charles C. Highley, Sarah Highley Holstein and Nancy P. Highley.

The account, copy of will and petition for distribution are hereto attached.

The account is confirmed.

AND NOW, December 5th, 1921, this adjudication is confirmed NISI. If no exceptions are filed within the time fixed by the rule of Court, counsel for accountant will prepare a schedule of distribution and certify that it is in conformity with this adjudication; if and when approved by the Court it is to be attached hereto and form part hereof; and Annie Corson Way, executrix of Mary P. Highley, the deceased executrix of Deborah Highley, deceased, will pay the distribution herein awarded.

In the Orphans' Court of Montgomery County.**Estate of Sarah Stryker Browne, deceased.**

A. died leaving a will in which she devised to her husband B. all her personal effects, and gave the residue of her estate to her children. B. died leaving a will in which he appoints his wife, C. testamentary guardian of his minor children. The question raised at the distribution was whether the testamentary guardian, appointed under the will of B. would be sufficient to give said guardian control over the estate coming to the minors under the will of A. The testamentary guardian who has custody of the children is also entitled to whatever property said guardian is entitled until said children reach their majority, with the provision that said guardian shall be subject to the authority and control of the Orphan's Court, therefore, the balance in this estate is awarded to the testamentary guardian named under the will of B. with the order that said guardian enter security for the amount coming to her.

No. 4, December Term, 1921.

Adjudication.

Franklin L. Wright, Esq., and Pierce Archer, Jr., Esq., Attorneys
for accountant.

Opinion by Solly P. J., December 16, 1921.

Sarah Stryker Browne, a resident of the Township of Lower Merion, died on the 12th day of June, 1909, having made her last will and testament in writing, bearing date the 11th day of July, 1906, duly probated the 29th day of June, 1909, on which letters testamentary were granted to Thomas Beaver Browne, the surviving husband of the testatrix, who was appointed sole executor.

Besides her husband she was survived by issue, two minor children, Sarah Stryker Browne and Samuel S. Browne, both of whom are living.

The testatrix bequeathed to her husband all personal effects, consisting of jewelry, clothing, household furniture, silver, etc., and bequeathed the residue of her estate in equal shares to her children.

At the time of her death the testatrix was possessed of personal estate. The executor died September 8, 1919, without having completed the administration of the estate. At the time there was a balance of cash in bank and a number of investment securities in the name of the testatrix.

Letters of administration d. b. n. c. t. a. on the estate were granted to the accountant the 24th day of June, 1920. The surviving husband left a will bearing date the 9th day of December, 1914, duly probated the 19th day of November, 1919, which

Browne's Estate.

is recorded in Will Book No. 52, page 1, in which he gave his entire estate to his wife, Marcy C. Browne, and appointed her sole guardian of his children.

The administrator here received from said executrix bank deposits and the securities belonging to the estate of Sarah Stryker Browne; and in the account before the court, which was filed the 21st day of October, 1921, he charged himself with these matters amounting in the aggregate to \$13,586.13. The balance shown by the account, principal and income, is \$14,022.92.

The testatrix having died prior to the passage of the direct inheritance tax act, there is no tax due the Commonwealth.

The accountant is allowed an additional credit of \$17. costs of filing account and adjudication.

The net balance is \$14,005.92, which with accumulated income since January 1, 1921, is awarded as hereinafter stated. We were informed at the audit that it is the desire of the distributee to take the unconverted securities in kind.

Marcy C. Browne, the wife of Thomas Beaver Browne the father of Sarah Stryker Browne and Samuel S. Browne, is their testamentary guardian under his will. These two children take the estate of their mother in equal shares.

Testamentary guardianship extends to the person and all the real and personal estate of the child and continues until the child arrives at full age. This is so because it is expressly so provided by the Statute of 12 Charles II, Ch. XXIV, which statute, enacted in 1660, was reenacted by the Act of January 28, 1777, 1 Smith's Laws 429, and, as is said by Judge Penrose in Sheetz's Est., 6 Pa., Dist. Rep. 367, continues to be the law of this state to this day except so far as modified by subsequent acts. The 9th Section of the Act of 12 Charles II provides that a testamentary guardian to whom the custody of a child has been given shall and may take into his custody, to the use of such child, the profits of all lands, tenements and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estates of such child until he reaches the age of twenty-one years. There has been no modification whatever of this provision of the act giving a testamentary guardian the right to the custody of all property of the ward, irrespective of the source from which derived, and to the exclusion of every other species of guardian, and hence

Browne's Estate.

where there is a testamentary guardian, the Orphans' Court is without authority to appoint. The law as to the duties and powers of a testamentary guardian are clearly set forth in the opinion of Judge Penrose. The estate in the hands of the accountant is accordingly awarded in equal shares to Sarah Stryker Browne and Samuel S. Browne, the minor children of Sarah Stryker Browne, deceased, payable to Marcy C. Browne, their testamentary guardian. Before the awards are paid we direct that she enter security as testamentary guardian for each minor in the sum of \$14,000, with security to be approved by the court. "All guardians, testamentary or otherwise, are subject to the authority and control of the Orphans' Court, and all, in proper cases, may be required to give security for the ward's protection." Scheetz's Est., supra.

The balance of the estate as shown by the account, together with accrued incomes since January 1, 1921, is divided into two shares; one share is awarded to Marcy C. Browne, testamentary guardian of Sarah Stryker Browne, and the other share to Marcy C. Browne, testamentary guardian of Samuel S. Browne. Authority is given the accountant to make the necessary assignments and transfers of the unconverted securities which the testamentary guardian desires to have awarded in kind.

The account, copy of will and petition for distribution are hereto attached.

The account is confirmed.

AND NOW, December 16, 1921, this adjudication is confirmed NISI. If no exceptions are filed within the time fixed by the rule of court, counsel for accountant will prepare a schedule of distribution and certify that it is in conformity with this adjudication; if and when approved by the court it is to be attached hereto and form part hereof, and John S. Albert, administrator d. b. n. c. t. a. as aforesaid, will pay the distributions herein awarded.

In the Court of Common Pleas of Montgomery County.**Wisnieski vs. The Kosciuszko Store Incorporated**

A. through his agent, B., rented a store to C., a corporation. C. subsequently went into the hands of a receiver, and as part of the assets of C. the lease, which contained an option to buy was sold and bought in by D. When the receiver went into possession of the premises there was about three months' rent due, which, together with the rent accruing during the receivership, were paid by the receiver.

During the period of the lease the payments of rent were not made on the dates due, but were accepted at later dates, and at somewhat irregular intervals. A. brought ejectment proceedings against D., the assignee under the lease, in which was a clause for the entry of judgment. D. petitioned for a rule to show cause why judgment should not be opened and defendant let into a defense. Where lessor has accepted rent at irregular intervals he cannot then enforce the lease without first giving notice to the lessee, and when a receiver of a lessee is in possession of the premises the said receiver is an officer of the Court, and the rent during his tenure is secured, so that a forfeiture of the lease cannot take place during the tenure of the receiver, therefore, there was no forfeiture of the lease when ejectment proceedings were brought, as the rent due was paid in full, and A. had not notified C. or D. of his intention prior to bringing the action of ejectment of strictly adhering to the terms of the lease, therefore, judgment is opened.

No. 43, November Term, 1921.

Rule to open judgment in ejectment.

Henry Freedley, Attorney for Plaintiff.

H. I. Fox, Attorney for Defendant.

Opinion by Swartz, P. J., January 27, 1922.

The judgment was entered under a lease providing for an amicable action of ejectment.

The petitioners to whom the lease was assigned under a Receiver's sale ask leave to intervene, and pray that the judgment may be opened to let them into a defense.

1. The corporation leased from the plaintiff stores Nos. 10 and 12 East Hector Street, Conshohocken, for the term of five years from January 12, 1920, at a rental of twenty dollars per month, payable in advance.

The lease also gave to the corporation the "privilege of purchasing at any time within five years, for the price of \$6,500, stores Nos. 8 to 16 inclusive." The four buildings on East Hector Street included Nos. 10 and 12, the stores named in the lease. The privilege to purchase is followed by the words: "Two hundred dollars paid on account thereof, the receipt of which is hereby acknowledged."

2. The lease provided, that if the rent was in default the lessor could, at his option, determine the lease, and any attorney for the lessee could sign an amicable agreement for judgment in ejectment.

3. The lease also provided that the rent should be paid at 119 Fayette Street, Conshohocken. This was the office of George W. DeHaven, a real estate and insurance agent and a collector of rents.

MONTGOMERY COUNTY

Wisnieski vs. The Kosciuszko Store, Incorp.

All rents were paid to Mr. DeHaven, sometimes at his office, and, at other times he called at the store of the lessee and received the rent. All receipts for rent were signed by him, in a book kept for that purpose. At the top of the page the words appear, "The Kosciuszko Store Incorporated, in account with George W. DeHaven, Agent."

4. The lessee occupied the buildings until June 18, 1921. The corporation conducted a general department store.

5. On the said 18th day of June, 1921, a bill in equity was filed alleging that the corporation lessee was insolvent. On the same day Eugene L. Tiernan was appointed temporary receiver. On July 1, 1921, he was made permanent receiver. He took charge of the business at once, on June 18, 1921.

6. The lessee did not pay the rent regularly as it fell due. The first payment was not made until February 16, 1920, when the sum of \$40 was paid. It was overdue for more than one month. The March and April payments were each made on the 14th of the month. After that date the payments were never made when the rent fell due. On May 24, the lessee paid \$20, on June 21 \$20, on August 27 \$40, September 28 \$20, October 28 \$20, November 29 \$20, January 15, 1921, \$40, April 21 \$25, June 11 \$20.

When the receiver took possession the rent due and unpaid amounted to \$55.

7. The receiver informed Mr. DeHaven that this overdue rent was a preferred claim but that he was not advised whether he had the right to pay it without an order of the Court. He asked Mr. DeHaven to present a written claim. Mr. DeHaven, agent for the lessor, qualified to the claim before a justice of the peace and presented it to the receiver on October 7, 1921.

On December 5, 1921, the receiver paid the \$55 to Mr. DeHaven, without any order from the Court.

8. The receiver paid the rent to Mr. DeHaven for the four months during which he was in possession of the store. He informed him when the receivership began that he would pay rent as he wanted it at any time. These payments were also irregular. On July 29, 1921, he paid \$40, on September 3, \$20, on October 25, \$20, and on December 5, \$75—which included the rent of \$55 overdue when the receiver took charge of the store.

9. On October 7, 1921, the receiver applied for an order of Court authorizing him to sell the articles remaining unsold in the

Wisnieski vs. The Kosciuszko Store, Incorp.

store, and also the interest of the corporation in the unexpired lease, and for an order to assign said lease to the purchaser at such sale.

The Court granted a rule on this application, which was served on certain rival bidders at private sale.

The rule was made absolute on October 24, 1921, and the receiver advertised the sale for November 14, 1921. The sale bills and advertisements gave notice that the unexpired lease from plaintiff would be sold. The sale bills were posted two weeks before the day of sale. The posters and advertisements gave notice that the receiver was selling the assets, including the lease, under an order of the Court.

10. On October 25, 1921, the lessor gave notice to the receiver, that the terms and covenants in the said lease had been violated and that all rights of the lessee had ceased and terminated thereunder.

Whether the corporation lessee was notified of the termination of the lease does not appear, except that in the proceedings under the amicable judgment in ejectment it is alleged that such notice was given to the defendant.

11. On the 14th day of November, 1921, the receiver sold the personal assets of the insolvent corporation, including the interest of the lessee, in the unexpired term, and privilege to purchase the stores, for the sum of \$1525.

The assignment of this lease, with the privilege to buy, was a valuable asset to meet claims of creditors. At the sale the amount realized for such assignment was about \$1,000.

12. At said sale the lessor read a notice to intended purchasers, that the lease was forfeited, that all rights thereunder had terminated and that a purchaser at the sale would acquire no rights under the lease.

13. On the 16th of November, 1921, the receiver reported the sale to the Court and it was confirmed nisi. On November 30th, 1921, the sale was confirmed absolutely and the receiver was directed to assign the lease to the purchaser. This transfer was made on the first day of December, 1921. The lessor never appeared in Court to attack the sale or assignment.

14. On December 20, 1921, the lessor filed his affidavit, in the Court of Common Pleas, as the basis for the amicable action in ejectment.

He alleged that on August 12, 1921, he was present at 119 Fayette Street, in Conshohocken, the place named in the lease, for payment of the rent, and that said rent was not paid or tendered. He

alleges that he was present, at the same place, on September 12 and October 12, 1921, and that the rent was not paid or tendered.

This affidavit concludes, "that on the 25th of October, 1921, all the said three instalments of rent being in arrear and unpaid, I exercised my option to cancel the lease, for said rent being in arrear and unpaid, and the same day notified the defendant of said cancellation and required it to remove from the said premises."

The amicable action in ejectment was brought the same day. The judgment according to the agreement of record was entered on the said day of December 20 upon the allegation of the lessor that the covenants and terms of the lease were broken, in that the rent due the 12th day of August, the 12th day of September and the 12th day of October, 1921, was not paid at the place appointed in said lease.

15. The petitioners, the assignees of the said lease, took possession of the premises on the said first day of December, 1921, and tendered to the lessor personally, on December 17th, 1921, the sum of \$20, being the rent for one month, which was not accepted.

16. On December 27, 1921, the said assignees of the lease petitioned the Court for leave to intervene, in proceedings to open the judgment entered under the amicable action in ejectment.

17. There is no intimation whatever, in the evidence submitted or in the proceedings before us, that the lessee declined to accept the rent paid to Mr. DeHaven or that Mr. DeHaven did not promptly pay over the money as he received it.

No notice of any kind was given, that the payments should be made direct to the lessor.

18. During the period of nearly two years the rent was paid to Mr. DeHaven. The payments were very irregular. Sometimes the tenant did not pay until the rent was two months overdue. The lessee corporation made no payment between January 15 and April 21, 1921. When the receiver went into possession the arrearages of rent amounted to \$55. No complaint was made at any time to the corporation tenant or to the receiver by the landlord or by Mr. DeHaven that thereafter payments must be made according to the terms of the lease. Walenti Wisnieski was a very complacent landlord. And yet without a word of warning, complaint or notice, he attempted to forfeit the lease because the tenant violated its terms in not paying the rent promptly as it fell due.

The evidence indicates that he could sell his four properties named in the lease at a higher price than the option given under the

Wisniewski vs. The Kosciuszko Store, Incorp.

lease. No doubt this was the real cause for the sudden change in his course of conduct as to the strict enforcement of the terms of the lease.

Under the foregoing findings the question presents itself whether the rent was in arrears, as alleged in the amicable action in ejectment, and whether it was in arrears when the notice of forfeiture was given on October 25, 1921.

It is very evident that the receiver intended his payments, in July, September and October, amounting to \$80, to be applied in liquidation of the rent or the time he occupied the store as receiver. He told Mr. DeHaven, distinctly, that the receiver could not pay the arrearages of \$55, and that Mr. DeHaven should present this claim to the receiver, as a preference. Mr. DeHaven so understood the payments, because he submitted his rent claim to the receiver, as late as October 7th, 1921. Clearly on that date the presentation of the claim is an admission that the receiver's payment had not been applied to the old rent. The receiver had the right to apply his payments to the debts he had incurred and Mr. DeHaven and the landlord were bound to respect the receiver's application when he made known his purpose at the time of payment.

The lease was forfeited, as the proceedings distinctly show, for the failure to pay the instalments of rent due August 12, September 12 and October 12. The receiver had paid these installments on July 29, September 3 and October 25. They covered the period of the first three months he was in possession of the store.

When the notice of forfeiture was given on October 25 there was no rent due for the said three months. This notice failed to state in what manner the lessee had violated the terms of the lease, but the affidavit in support of the amicable action filed on December 20, 1921, distinctly avers that the lease was forfeited for the non-payment of these instalments of August 12, September 12 and October 12. When the judgment in ejectment was entered, on December 20, 1921, the rent had been fully paid and accepted, on December 5, for the four months. There can be no forfeiture of rent which was discharged before the forfeiture took place.

On December 5, the landlord, through his duly authorized collector, received rent which accrued after the notice of forfeiture was served on the lessee.

"Whenever a landlord means to take advantage of a breach of a covenant, so that it should operate as a forfeiture of the lease he must take care not to do anything which may be deemed an acknowl-

Wisnieski vs. The Kosciuszko Store, Incorp.

edgment of the tenancy and so operate as a waiver of the forfeiture; as distraining for rent or lodging an action for the payment of it, after the forfeiture has accrued, or accepting rent. Courts always lean against a forfeiture." *Newman vs. Rutter*, 8 Watts, 51. A receipt for the rent is a waiver of the breach: *Davis vs. Moss*, 38 Pa. 346; *Verdolite Co. vs. Richards*, 7 Northampton, 113.

When we examine the amiable action in ejectment, it appears that the forfeiture was declared upon the alleged non-payment of the three installments of rent already named. These installments were paid long before judgment under the amicable action was entered. This is sufficient to open the judgment. *Higgins vs. Lightcap*, 15 Sch. 135.

There is no answer to the petition to open judgment that the proper parties are not before us.

The landlord to sustain his judgment is confined to the causes specified. We cannot infer that there are any causes not declared to be such: *McKnight vs. Kreutz*, 51 Pa. 232.

Where there is proof that the rent was paid upon which the forfeiture and judgment on the warrant of attorney are based the judgment should be opened.

Again, even if the rent was in arrears, the landlord received the payments without any remonstrance whatever. The tenant might well believe from such acquiescence that strict compliance with the terms of the lease would not be enforced: *Humane Engine Co. vs. Salvation Army*, 18 Montg. L. R. 13.

After a long course of dealing involving delayed payments a lessor will not be allowed to insist upon a strict compliance with the terms of payment and forfeit the lease, without first giving the tenant warning: *Cogley vs. Browne*, 11 W. N. C. 324. This rule is followed again and again in the lower Courts and is fully approved in *Duffield vs. Hue*, 129 Pa. 94. "The lessee might well believe, from such acquiescence that strict performance of the terms of the lease as to the time of putting down the wells would not be insisted on and that reasonable notice should be given before a forfeiture could be claimed."

See also *McClelland vs. Rush*, 150 Pa. 57; *Thomas vs. Boyle*, 265 Pa. 487.

There is another serious objection to this attempted forfeiture of the lease. The breaches, under the affidavit, were due to the receiver's alleged default in not paying the rent in August, September and October. During this period the receiver was in possession.

Wisniewski vs. The Kosciuszko Store, Incorp.

He was acting as the representative of the Court in protecting the interests of the creditors of the insolvent corporation. He was the ministerial officer of the Court. His contracts and liabilities are the contracts and liabilities of the Court: 23 R. C. L., page 9.

It must be noted that the judgment in ejectment was not entered for any default on the part of the present holders of the assigned lease. They offered to pay their rent and it was not accepted. The judgment was entered because the receiver, as alleged, did not pay the installments due during his possession of the premises. The forfeiture was not declared because of any rent overdue when the receiver went into possession. In *Hause vs. Selzwick*, 56 Pitts. L. J. 349, the Court held "that it was immaterial when the receiver paid the rent; the rent was a preferred claim and it was largely optional with the receiver as to the time when he should make payment, and of no moment to the lessor, for the reason that his rent was secured."

The possession of the receiver was the possession of the Court. He occupied the store and was in sole control of the assets of the insolvent corporation. The notice given by the lessor to the receiver to remove all his property from the premises was an attempt to interfere with the assets of the corporation without leave of Court first obtained.

The lessor followed this action by a writ of *Habere Possessionem*. No writ or levy can be issued against property in the receiver's custody.

If the receiver elects to adopt the lease he becomes vested with the title and a privity of estate between the lessor and receiver is thereby created; an election is manifested by entering into possession and occupying the leased property: 23 R. C. L., page 76. The receiver must pay the rent. The liability of the receiver is official and must be discharged through his administration as receiver. The preferred claim of the lessor, if he wishes to enforce it immediately, must be enforced through the supervision of the Court. The landlord cannot exercise his rights under his lease without leave of the Court: 34 Cyc., page 224. Notice upon receivers by the landlord to oust them from the possession upon the ground of forfeiture of the lease is ineffective without the permission of the Court first obtained for such action: *Commercial Trust Co. vs. Wertheim Coal Co.*, 88 N. J. Equity, 143; *Everett vs. Neff*, 28 Md. 176; *Martin vs. Blade*, 9 Paige, N. Y., 641.

The landlord's right to a forfeiture of the lease must be worked out either in the action in which the receivers were appointed or in

an independent action brought only upon leave of the Court by which the appointment was made: Clark on Receivers, Vol. 1, Sect. 765.

But it is useless to continue this discussion, because if we are correct in our findings there was no default on the part of the receiver. At the time of the notice of forfeiture the rent was paid and accepted. Fifteen days before the amicable action in ejectment was entered all rent due from the receiver was paid and accepted, as well as all arrearages due from the corporation at the time the receiver entered upon the premises.

The judgment is therefore opened for the reasons:

1. That the three installments of rent due in August, September and October were fully paid when the notice of forfeiture was given, and no other cause for forfeiture is assigned in the proceedings upon which the judgment was entered; and no rent of any kind was due on December 20, 1921, when the judgment in ejectment was filed.

2. That even if any rent was overdue, the course of dealing for two years shows that there was such an acquiescence, as to the delayed payments, that the lessor could not without notice first given insist upon a strict compliance with the terms of the lease as to the payment of rent.

3. That the lessor cannot interfere with the receiver's custody of the property and assets of the insolvent corporation without leave of Court first obtained, especially so when the receiver had paid the rent for the whole time that he occupied the premises.

AND NOW, January 27, 1922, after a careful consideration of the record the evidence and the argument of counsel the judgment is opened to allow the assignees of the lease, the intervening parties, to make defense to the judgment.

The parties will submit proper issues for the approval of the Court.

In the Orphans' Court of Montgomery County.**Estate of J. Watson Craft, Deceased.**

Decedent died leaving a will, in which he stated the executors should not be allowed any commissions for services, having stated that this was occasioned by reason of the provision made by him for them. The appraiser appointed to fix the inheritance tax refused to allow reasonable compensation as a deduction, whereupon this appeal was taken. Under Section 41 of the Act of June 20, 1919, P. L. 521, provision was made that where testator made a bequest to his executors in lieu of commission and such was in excess of what would be reasonable compensation, then the excess would be subject to the tax, and as it is evident in this case the testator made a devise to the executors in lieu of commissions, and therefore a reasonable compensation should be allowed for the purpose of fixing the inheritance tax and the appeal of the executors is sustained.

No. 34, August Term, 1921.

Appeal from transfer inheritance tax.

G. Herbert Jenkins, Attorney for Executors.

Samuel D. Conver, Attorney for Commonwealth.

Opinion by Solly, P. J., November 7, 1921.

In the third paragraph of his will the testator provided: "I constitute and appoint my wife, Mary Adelaide Craft, and my sons, Evan Franklin Craft and Joseph Watson Craft, Jr., Executors of this my last will and testament, and trustees of the trusts herein declared. In view of the provision I have herein made for each of them, I direct that no commissions shall be charged by them, or paid to them by my estate for their services as such Executors.
* * *

The will gives to a daughter \$25 per week, to be paid to her during the lifetime of the widow; two specific legacies to the widow, and the residue of the estate is devised and bequeathed to the trustees, in trust, to pay the net income to the widow during her life, and at her death to divide the remainder among the testator's children then living and the issue of any then deceased.

The appraiser appointed to appraise the estate for the purpose of ascertaining and fixing the amount of the transfer inheritance tax was requested by the Executors to allow as a deduction, the sum of \$10,000 as fair compensation for their services. The appraiser refused so to do, whereupon the executors appealed. The record has been certified to the Court. All persons having accepted notice, the matter was heard. There were two grounds of appeal, but one averring excessive valuation of the real estate was withdrawn at bar.

The appellants contend that the appraiser should have allowed a deduction of \$10,000 (admittedly a fair and reasonable amount)

Craft's Estate.

as their commissions, under Section 41, Act of June 20, 1919, P. L. 521, which reads: "Where a testator appoints or names one or more executors or trustees, and makes a bequest or devise of property to them in lieu of their commissions or allowances, or appoints them his residuary legatees, and said bequest, devise or residuary legacy exceeds what would be a fair compensation for their services, such excess shall be subject to the payment of the tax at the rate, in each case provided for in this act." The appellants argue that the language used by the testator in the third clause of the will clearly shows his meaning to be that the executors should not charge, and there should not be paid to them, any commissions because of the provision he had made for each of them in giving them portions of his estate; that the words "in view of" convey the same meaning as "because;" and that "in view of" are equivalent to and mean the same as "in lieu of," used in the Act. This appeals to us as sound reasoning. One purpose of the legislature in enacting the provisions of the 41st section of the Act would seem to be to exempt from the payment of the tax so much of a legacy or devise given to an executor or trustee in lieu of commissions as would be considered in law fair compensation to an executor or trustee for his services as such.

The reason is his services and responsibility as fiduciary under the will in such case were being compensated by the legacy or devise, and it was but just that as the difference between what would be fair compensation for such services and responsibility and the amount of the legacy or devise, would be the estate passing under the will, such difference should be subject to the tax. The testator here intended the executors should not be entitled to any commission on the estate administered in view of his having given them his estate. While there is no legacy or devise specifically or expressly given the executors in lieu of commissions, nevertheless the intent and meaning of the testator seems to appear plainly that included in the division of his estate among them and his daughter are their commissions for the administration of the estate.

Another purpose of the Act, it would seem, was to prevent evasion of the payment of the tax where a testator gave a legacy or a large devise to his executors or trustees in lieu of commissions, the amount or value of which was in excess of what the law allows as compensation. It was intended that the Commonwealth could not be thereby deprived of the tax which it was entitled to. What

Craft's Estate.

is fair and reasonable compensation is not taxable; the amount of a legacy or devise above that is.

Being of the opinion that the testator gave a portion of his estate to the executors as legatees and devisees in lieu of commissions, and that \$10,000 is a fair compensation for their services in the administration of the estate, that amount is allowed as a deduction.

AND NOW, November 7th, 1921, after hearing, argument and due consideration, the appeal is sustained. Costs to be paid by estate.

In the Court of Common Pleas of Montgomery County.

Moore vs. Heist

Plaintiff sued defendant for loss sustained by reason of the failure of warranty in the purchase of certain heifers. The plaintiff showed that the warranty was never fulfilled, and that the plaintiff endeavored to get the matter adjusted, and showed that the heifers without the warranty were worth so much, that his loss was based on the actual value of the heifers without the warranty deducted from the actual purchase price. The jury brought in a verdict awarding the plaintiff full damages, a motion for a new trial was made, and also for judgment N. O. V. The evidence as produced was left with the jury with proper instructions, and there was no error on the part of the trial judge in giving his instructions, and the verdict must, therefore, stand, and motions are overruled.

No. 65, September Term, 1919.

Motion for new trial and judgment N. O. V.

Evans, High, Dittra and Swartz, Attorneys for Plaintiff.

Monroe H. Anders, Attorney for Defendant.

Opinion by Swartz, P. J., December 24, 1921.

Two reasons were filed for a new trial. The first alleges that the verdict was against the law and the evidence, and the second declares that the verdict was against the weight of the evidence.

The pleadings admitted that the plaintiff purchased from the defendant three heifers that were warranted to be with calf by a bull named "Rex."

The evidence is uncontradicted that they were not with calf when purchased, unless they aborted after the sale. The plaintiff sued to recover damages for the breach of the warranty.

There was no evidence, other than conjecture, that the heifers might have aborted without the knowledge of the plaintiff. This question was carefully submitted to the jury under the meager testimony offered at the trial.

The jury was instructed that if the heifers aborted their calves after the sale, the plaintiff could not recover.

The defendant contended that no notice of the breach of the warranty was given to him within a reasonable time after the plaintiff knew or ought to have known of such breach.

The heifers were purchased on December 7, 1917, and the plaintiff did not discover that the heifers were not with calf until about the fifteenth day of April, 1918.

They were registered cattle, and the price, \$1,070, indicated that they were of considerable value. The plaintiff during the winter months, kept his stock in the stable. On some occasions he put them out in the barnyard. About the middle of April he turned them into the fields and then discovered, by their actions, that they were not with calf. He was in the stable about every other day and looked after his stock. He bought them for breeding purposes and was interested in his cattle, consisting of about a dozen cows and heifers.

It is contended that the plaintiff ought to have discovered their true condition before the middle of April, 1918.

A number of witnesses testified upon this point, some declaring that such discovery could not be made at an earlier date by observation of external appearances or by handling them. This testimony was not seriously disputed, but it was contended that by allowing them to roam in the field they would have given evidence of being in heat, if not with calf, and that these heat periods should have been observed in a period of two or three months.

The defendant also contended that the plaintiff should have called in a veterinarian to make an internal examination to ascertain whether conception had taken place. One veterinarian testified that such scientific examinations were attended with some danger to the animal; another declared that there was no such danger; at least, he had had no loss of any animal in his experience.

It would seem that the plaintiff had the right to place some reliance on the warranty and that he was not called upon to incur the expense or risk of such examination. But we submitted all these questions to the jury, whether the plaintiff ought to have discovered the true condition of the heifers before the middle of April. Our charge upon this inquiry was carefully presented to the jury, without any intimation how they should find.

The same is true as to the evidence relating to the time when the notice in fact was given to the defendant.

It is claimed that the damages awarded by the jury are excessive.

The defendant and his witnesses estimated the damages upon the basis of the cost to the plaintiff for having the heifers re-served by the bull "Rex" or one of equal standing, and the cost of feeding them for an additional period of several months. Of course, this was a false measure of damages, for even after such re-service there was no assurance that they were with calf. There was another contingency. The age of the heifers was such that if they were not with calf under the opportunities afforded in the pasture with the bull "Rex" there was a suspicion that they were barren heifers.

On the other hand, the testimony for the plaintiff was positive that their value under all the circumstances, without the warranty, was only \$300.

The jury was instructed that the burden rested upon the plaintiff to establish his damages; that if the evidence was not sufficient to enable them to find the true damages there could be no verdict in his favor.

We are not convinced that there is any error upon which we could base an order for a new trial, nor is there any evidence that would justify a reduction of the verdict.

From what we have said, it is evident that this was a case for the jury. We could not have granted a non-suit nor given binding instructions for the defendant.

AND NOW, December 24, 1921, the motion for a new trial is overruled and the reasons are dismissed. The motion for judgment non obstante veredicto is also overruled and it is now ordered that the judgment be entered in favor of the plaintiff and against the defendant upon the verdict of the jury and upon the payment of the verdict fee.

In the Court of Common Pleas of Montgomery County.**James vs. James**

In a proceeding brought by husband on ground set forth in Act of June 25, 1895, Par. 1, P. L. 308, pursuant to provisions of Act April 18, 1905, P. L. 211, in which his wife appears and defends, he is not rendered incompetent to testify by reason of either the hopeless lunacy, in the fact that, under the Act May 28, 1907, P. L. 292, she had therefore been decreed to be so mentally defective as to be unable to take care of her property.

Such a decree is not an adjudication of her lunacy within the meaning of Par. 5 (c) of Act May 23, 1887, P. L. 158.

No. 64, February Term, 1921.

Divorce.

Evans, High, Dettra & Swartz, Attorneys for Libellant.

Williams & Egan, Attorneys for Respondent.

Opinion by Miller, J., January 16, 1922.

The exceptionally careful scrutiny of the record, which a case of this character requires, suggests for consideration the question of whether the libellant was competent to testify, notwithstanding that no objection to his testimony was made before the master. With it, a case is clearly made out; without it, the proof scarcely measures up to the standard which applies here.

Appearance for the respondent was entered by her counsel who was ruled to answer, but no answer was filed. Nevertheless, she, with her attorney, attended the meetings before the master, but, for some reason, the libellant's witnesses were not cross-examined, nor was any testimony on behalf of the respondent offered. No exceptions were filed to the report recommending a divorce, but counsel for the respondent appeared at, and took part in, the argument. Therefore, whether under paragraph (c.) of Section 5 of the act of May 23, 1887, P. L. 158, because the respondent appeared and defended, or the amendatory act of April 21, 1915, P. L. 154, which provides that in all proceedings for divorce the libellant shall be fully competent to prove all the facts, or both, the libellant was competent generally and, were it not for the peculiar facts of this case, the question of his competency would be of no interest. But here, the situation is somewhat unusual.

The ground for divorce, as laid under the amendatory act of June 25, 1895, paragraph 1, P. L. 308, was that the respondent had by her cruel and barbarous treatment and indignities to the person of the libellant rendered his condition intolerable and life burden-

James vs. James.

some. The action was brought under the amendatory act of April 18, 1905, P. L. 211, which relates to procedure and the degree of proof required. The course of treatment, of which complaint was made, terminated on or about August 21, 1918, when the respondent, who had suddenly become of impaired mentality, was lawfully committed to a hospital for treatment. She has been under restraint ever since that time and is now hopelessly insane. Pursuant to proceedings brought by her husband, the libellant, under the act of May 28, 1907, P. L. 292, she was, after hearing, on March 9, 1921, adjudged and decreed by the court to be so mentally defective as to be unable to take care of her property and, in consequence thereof, was liable to dissipate or lose the same and become the victim of designing persons and a guardian of her estate was appointed. Service of the subpoena was made upon the guardian.

The respondent was never the subject of an inquisition under the act of 1836.

Paragraph (e.) of Section 5, of the act of 1887, *supra*, provides:

"Nor, where any party to a thing or contract * * * in action * * * has been adjudged a lunatic and his right thereto or therein has passed * * * to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract * * * be a competent witness to any matter occurring before * * * the adjudication of his lunacy * * *."

The libellant was, therefore, competent under paragraph (c.), unless he was rendered incompetent by paragraph (e.): *Strause vs. Braunreuter*, *appel.*, 4 Pa. Sup. Ct. 263, and the exact question before us may be resolved into, whether or not, by reason of the circumstances just narrated, the respondent had been "adjudged a lunatic" within the contemplation of section 5 (e.) of the Act of 1887.

The word "adjudged" can be predicated only of an act of the court: *Senbright vs. the Commonwealth*, 13 S. & R. 301, 303; an "adjudication" is a judgment, a determination in the exercise of judicial power: *Street, et al., appel. vs. Benner, et al.*, 20 Fla. 700, 713; and "to adjudicate" is solemnly or deliberately to determine by judicial power upon a hearing of the rights and interests of the parties involved on the issues and the evidence to be taken and submitted according to some prescribed method, or, in the absence

thereof, the usual method of procedure known to the statutes or the common law, and, after a hearing in respect of the matters in issue, to decide and decree what are the respective rights of the parties as they may appear from the law and evidence adduced: 1 C. J. 1236. The decree of March 9, 1921 was, therefore, undoubtedly an adjudication, but was it of respondent's lunacy?

When the act of 1887 was passed an inquisition in lunacy under the act of 1836 was the only method known to our law whereby a person could be adjudged a lunatic and this is one of the circumstances in the light of which it is to be read, especially where its language is clear and unambiguous and its general purpose was to make competency the rule and incompetency the exception. Furthermore, the disqualification is expressly predicated, not upon the lunacy of the adverse party, which, in this case, must be conceded, otherwise we have no jurisdiction, but upon an adjudication thereof.

The word "lunatic" in the act of 1836 is, by its 67th section, to be construed to mean and include every person of unsound mind. Amongst the duties of an inquisition is to inquire how long the alleged lunatic has been such, if he is so found by them, and if he enjoys lucid intervals. The purposes of the act are to control the care and custody of the lunatic's person and to safeguard his estate, if he has one.

The first so-called "weak-minded persons" act, that of June 25, 1895, P. L. 300, was passed "for the protection of persons unable to care for their own property," and applied to but a single class, who were defined by it as so "weak in mind" as to be utterly unable to do so. Neither it, nor its amendment of June 19, 1901, P. L. 574, contained any provision relating to the care of the person. Both had for their sole purpose the protection of property. "The legislature, by the act of * * * 1895," as was said by this court in *Sunderland's estate*, 14 Pa. D. R. 257, "undoubtedly distinguished between a lunatic and a weak-minded person, for otherwise there would have been no occasion for the act of 1895. When the act of June 13, 1836, P. L. 589, which provided for cases of unsoundness of mind, was passed, the word 'lunatic' had a defined meaning and did not include mere weakness of intellect or a disposition to squander an estate. It was assumed that a person might be sane and yet unable to properly care for his property, although he might of his person." The act of 1895 was intended to operate prospectively in order to

James vs. James.

protect a person, not a lunatic, nor an habitual drunkard, but weak-minded, against his own improvidence thereafter: *Gorgas vs. Saxman*, appel., 216 Pa. 237. It established a legal status or condition, intermediate between normal mental capacity and insanity or idiocy, a state of weak or enfeebled mind, neither *mens sana* nor *non compos mentis*: *Hoffman's Estate*, 209 Pa. 357. Also see *Hartman's lunacy*, 21 Pa. D. R. 708.

The field of operation of the act of 1895 was greatly extended by that of May 28, 1907, P. L. 292, without, however, working any material change in its underlying beneficent purpose, the protection of the property of unfortunates against their own improvidence. Inability to care for such property still continues the test. The classification of such persons is much enlarged by the later act. It now embraces those who are "insane, or feeble-minded, or epileptic or so mentally defective" as to be unable to care for their property. It was under this Act that, after hearing, the respondent was decreed to be "unable to take care of her property because of mental deficiency." She was not, however, either expressly or by necessary implication, adjudged to be a lunatic, or insane. The order had, and could have had, nothing to do with her custody. It merely, we repeat, safe-guarded her property.

While *Sunderland's estate*, *supra*, is to be distinguished on its facts from the case at bar, we are, for the reasons set forth, inclined to follow its principle and hold the libellant competent as a witness, and we reach this conclusion, notwithstanding the necessary, jurisdictional averment in the libel and the opinion expressed by the expert witness heard, concerning respondent's mental condition, because our finding, under the act of 1907, that Mrs. James was unable to care for her property was not, in our opinion, an adjudication that she was a lunatic within the meaning of the Act of 1887. She may have been, and unquestionably was, the latter when her husband appeared as a witness against her, which was the time as of which his competency was to be determined, but it was not the fact of her lunacy that was to determine his competency. The enabling Act of 1887, in so many words, makes the adjudication of such lunacy the disqualifying factor and it would be a plain usurpation of power so to construe it as to defeat its true meaning. It should be construed liberally so as to effect its purpose. It applies only to such cases as are fully within its provisions. It should not be extended beyond its express terms, especially as it makes no mention of habitual drunkards, who, at the time of its passage, equally with lunatics, enjoyed the protection of the law, and it used

James vs. James.

the words "adjudged a lunatic" advisedly: *Com. vs. Loomis*, *appel.*, 270 Pa. 254, 259. This may be a hard case, but a rule made to cover the exigencies of a particular case makes bad law generally: *Gorgas vs. Saxman*, *appel.*, *supra*.

Therefore, in our opinion, the libellant was not made incompetent to testify by either the adjudication that his wife was unable to care for her property, or her lunacy at the time of the hearings before the master.

As already stated, this proceeding was brought under the amendatory Act of April 18th, 1905, *supra*, which does not create a new ground for divorce, but relates only to procedure and the degree of proof required in cases where one of the parties is hopelessly insane. When the husband is the libellant, we are thereby vested with full and complete authority to provide alimony for the support of the insane wife during the term of her natural life by requiring the petitioner to file a bond, with surety or sureties, if necessary, in such sum as we may direct, conditioned as aforesaid, before granting the divorce prayed for. There is no question raised concerning the ability of the libellant to furnish such a bond and counsel have agreed that the sum of twenty dollars per week will be required for his wife's future support. Her age is not shown by the testimony. We, therefore, fix the sum of twenty dollars per week as alimony for the future support of the respondent and order the libellant to pay such sum weekly to her guardian, so long as she has such, otherwise to herself, from and after this date and for and during the term of her natural life.

It is further ordered that the libellant file a bond, in the penal sum of fifteen thousand dollars, with surety or sureties to be approved by the Court, conditioned for his prompt and faithful compliance with this order.

AND NOW, January 16th, 1922, proclamation being duly made in open court for Azalia Irene James, the respondent, to come forth, and she not appearing, it is ordered, decreed and adjudged that the said Alfred James, libellant, be divorced and separated from the bonds of matrimony contracted with the said Azalia Irene James, and that all and every the duties, rights, claims, and privileges accruing to either of said parties by reason of said marriage, except alimony for the respondent, as hereinbefore ordered to be paid by the libellant, shall henceforth cease and determine.

And it is further ordered that this decree shall not become effective until the libellant has executed the above-mentioned bond and it has been approved by the Court and filed of record.

In the Court of Common Pleas of Montgomery County**Robert M. Hallowell, Inc., vs. Kimink, et ux.**

Plaintiff brought suit against defendant in assumpsit, to which action defendant filed an affidavit of defense, and claimed a set off for unliquidated damages sounding in tort, the plaintiff demurred to the affidavit of defense. The proper practice where an affidavit of defense such as was filed in this case is to make a motion to strike off so much of the affidavit of defense to relate to the counter claim. Under Section 14 of the Practice Act of May 14, 1915, P. L. 483, defendant has no right to claim as a set off in unliquidated damages sounding in tort, therefore, a motion to strike out that portion of the affidavit of defense is allowed.

No. 119, September Term, 1921.

Motion to strike off part of affidavit of defense.

Harold G. Knight, Attorney for Plaintiff.

E. L. & Thomas Hallman, Attorneys for Defendant.

Opinion by Miller, J., Dec. 24, 1921.

BY THE COURT:

The question involved here resolves itself into one of practice. The plaintiff sued in assumpsit; the defendants filed an affidavit of defense to the merits and attached to it a set-off or counter-claim for unliquidated damages sounding in tort; the plaintiff made reply by way of demurrer to the latter; and the case appeared on the last argument list for disposition by the court on "plaintiff's answer to defendants' counter-claim raising questions of law."

We know of no power in the court to dispose of the case as it is thus presented and enter judgment.

Section 14 of the Practice act of May 14, 1915, P. L. 483, limits set-off or counter-claim in action of assumpsit to "any right or claim for which an action of assumpsit would lie." Backer vs. Remov, app., 69 Pa. Sup. Ct. 138. This was but a statutory declaration of a long-established principle of the common law. When, therefore, the defendants set up by way of counter-claim a demand for unliquidated damages arising ex delicto they violated the plain provisions of the law. Kelly vs. Miller, app., 249 Pa. 314. The plaintiff should then have moved to strike the set-off or counter-claim from the record. To the contrary, however, it replied by way of demurrer, which was not allowable.

As the case was fully argued we shall, however, consider the plaintiff's demurrer as in effect a motion to strike from the record so much of the defendants' affidavit of defense as relates to the counter-claim and the motion is allowed and the same is done. This puts the case at issue, and ready for trial on the statement and affidavit of defense.

Hallowell, Inc. vs., Kimink, et ux.

After the foregoing was written, but before it is filed, we have observed the case of *Hilton vs. Sharpless*, reported in the current issue of the *Legal Intelligencer*. Later it will be found in 30 Pa. D. R. 1059. There, Judge Landis appears to hold directly to the contrary on the question of practice here involved. His learning and experience have, quite naturally, caused us to give it further consideration. As a consequence, we are inclined to adhere to our opinion, especially as the report conveys no information concerning the character of, or the circumstances giving rise to, the set-off set up in the *Hilton* case. It may not have violated the act of 1915. Here, however, it does not conform to its express provision and section 21 would seem to apply, just as it does where the statement contains argumentative or informatory paragraphs, (*Atherton vs. Coal Co.*, 22 Lack. 19): those which are merely evidential in character, (*Golden vs. Collins*, 1 Wash. 191); or those which set up mere inferences or conclusions, (*Lutz vs. Wright*, 28 Pa. D. R. 32).

Furthermore, the act enumerates the pleadings that may be filed and determines when a case is at issue. The parties find themselves in court to adjust their differences and set forth their relative positions in their written pleadings. It is largely within their power thus to create their own issues. It is on these issues, as thus created, that they go to trial. Such issues must be not only clearly stated, but, at least to some extent, controlled by law. False issues cannot be injected into a case. They should be consistent or harmonious. Liability of the defendant, *ex contractu*, and of the plaintiff, *ex delicto*, cannot, ordinarily, be tried together. It is under section 21 of the act, therefore, that we exercise the control just mentioned. An issue should not be permitted to be raised by the parties in any case which the law declares can not be disposed of at its trial. A liberal construction of section 21 of the act would seem to be in harmony with its purpose and spirit.

In the Court of Common Pleas of Montgomery County**Barker vs. The Trustees of Bryn Mawr College, et al.**

A. was a student in the institution of the defendant which is a private corporation maintained by private bequests and gifts. After attending defendant college for a period of one year and six months, she was informed while being away on her Easter vacation, that she should not return. She then filed her petition in the Court for an alternative writ of mandamus to compel her re-instatement in the defendant institution. First; it was held that irrespective of the rightful or wrongful expulsion from a college which is maintained by private benefactors, the relation between the student and the college is solely contractual in character, and the Court has no right or jurisdiction to issue a writ of mandamus to compel her re-instatement, Second; where the college reserves the right to exclude a student when it regards such a one as undesirable the said college is not required to prefer charges against said student, Third; that even if the Court had jurisdiction it would be without power to interfere with any official discretion vested in the officers of a corporation such as defendant, and therefore, the peremptory writ of mandamus must be refused.

No. 1, June Term, 1921.

George Wharton Pepper and Montgomery Evans, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Swartz, P. J., and Miller, J., February, 1922.

The relator was excluded from Bryn Mawr College and seeks re-instatement. An alternative writ of mandamus was issued upon petition filed, the respondents made joint answer or return and the latter was then traversed by the relator. It was stipulated that trial by jury should be dispensed with and such issues raised by the pleadings as the court might deem relevant should be tried by it.

After hearing the evidence and arguments of counsel, we, pursuant to the terms of such agreement and in light of the relator's voluntary assumption of the burden of proof, find the facts, and draw therefrom the conclusions of law, which follow:

GENERAL FINDINGS OF FACT

1. "The Trustees of Bryn Mawr College" is a corporation of the first class under Pennsylvania law, chartered by this Court and maintaining an institution for the advanced education of women, known as Bryn Mawr College, at Bryn Mawr, in Lower Merion Township, this County, with power to confer degrees. It is a private corporation, deriving its revenues only from the charges which it makes against those who attend its courses, its privately bestowed endowment and other private benefactions. It receives no aid from the state or other public sources. It, of course, enjoys the privilege of exemption from taxation as to all its property that is used exclusively for its chartered purposes.

2. The members of the corporation, known as trustees, have

Barker vs. The Trustees of Bryn Mawr College, et al.

the whole management, care and control of its property and affairs. The actual exercise of much of this power has, by the by-laws and otherwise, been delegated by the trustees to the Board of Directors of the corporation, subject, however, to the supervision and control of the former. By the plan for the government of the College, duly adopted by the Board of Directors, the president is the principal executive of the college with "power to impose the more serious penalties for all non-academic offenses, including suspension and expulsion of students." The exercise of this power is not subject to appeal to, or review by, the board, although, as a fact, action, when taken, is reported to it as a matter of courtesy only.

When the result is suspension or expulsion, the president is required to report to the senate the action taken and, in so far as practicable, the reasons therefor. The senate by a two-thirds vote may then ask for a conference with the board of directors to discuss the principles involved in the action taken.

M. Carey Thomas, the second-named respondent, is now, and for many years has been, president of Bryn Mawr College.

3. The printed catalogues of the college, which is in general circulation and necessary for every student carefully to study, both before and after her admission, has for years contained a provision, or regulation, that "the College reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable and in such cases the fees due, or which may have been paid in advance to the college, will not be refunded or remitted in whole or in part."

4. Pembroke is one of the residence halls of the institution and the relator occupied, after the commencement of the college year of 1920-1921, in the latter part of September, 1920, a single room on the first floor of its west wing. The written contract for the occupancy of this room, which was executed by relator's mother, contained a provision to the effect that, in case of the dismissal of the relator from college, fees would not be remitted.

5. There are at the college two student organizations which are recognized by its management. One is known as the "Students' Association for Self-Government," the membership of which embraces all graduates and under-graduates of the college, and it functions through its "Executive force." Its province is to deal, more specifically, with the conduct of students.

The other is known as the "Undergraduates' Association" and its purpose is to foster the social side of student life in college.

Barken vs. The Trustees of Bryn Mawr College, et al.

Neither had any official connection with the matters hereinafter narrated.

6. The deans of the college are members of its faculty, academic council and senate, which last mentioned body has, for academic offenses, sole power to impose the more serious penalties, including suspension and expulsion from college, but is required to report in writing all important actions to the secretary of the board of directors by which body they are subject to review and determination.

The president is the presiding officer of the faculty, academic council, senate, and certain conferences.

In the absence or inability of the president of the college to act as such presiding officer, the dean of the college shall act in her stead, or, in the case of her inability to act, the recording dean shall then do so.

For the last two years, at least, Hilda W. Smith has been the dean of Bryn Mawr College and, during that time, whenever the president was absent, she has been its "acting president," while at the same time performing her ordinary duties as dean. In disciplinary matters, involving non-academic questions, the dean is the officer most closely in touch with the students, but, before taking action, even in minor cases, she always consults with the president, in whom is vested the ultimate exercise of authority and who alone imposes the more serious penalties in cases of this class.

7. Relevant notable events of the college year of 1920-1921 were the mid-year examinations, which were held in the latter part of January and continued for several days, an athletic meet, held on the afternoon of March 17th, and the Easter vacation, which commenced on March 23rd and ended not later than Monday, April 4th.

8. The relator, whose home is in Michigan City, Indiana, entered the college as a freshman at the beginning of the second semester of the college year of 1919-1920, or about February 1, 1920. She returned in September, 1920, for the college year of 1920-1921, passed successfully the mid-year examinations, held in January, 1921, and was thereupon admitted to the Sophomore class. At the time of the happening of the events hereinafter related she was in good academic standing and her tuition, room rent and all other charges, then due and payable, had been paid in full for the entire college year.

9. Another student, Prue Smith, after September, 1920, occupied a suite, consisting of a study and a bed-room, adjoining the

Barker vs. The Trustees of Bryn Mawr College, et al.

room of the relator and it was not only not unusual, but, to the contrary, quite customary, for the relator and other students temporarily to make use for study of the apartments of friends while their own were being tidied up by the maids, were cold, or were otherwise not conveniently available for comfortable and undisturbed use. Students do not seem to have been even ordinarily careful in locking the doors of their apartments, when they were absent therefrom, or in safeguarding their money and valuables, the favorite keeping-place for which appears to have been the upper drawers of the bureaus in their bed-rooms.

10. While at least some petty theft and pilfering, as distinguished from temporary, unauthorized use of property without the knowledge or consent of the owner, with an intention to return, seems unfortunately to have been committed early in the college year of 1920-1921, this annoyance assumed an aggravated form during the mid-year examinations in the latter part of January and thereafter persistently continued. These thefts were all committed in the morning between the hours of 9 and 10, when relator and three other students were "free,"—that is, not in class or recitation.

Many students sustained loss and some of the thefts involved substantial sums of money. The relator was amongst the victims. Money in small amounts was thus taken from her room before the mid-years, eleven dollars disappeared during their progress and, after they were over, her room was, occasionally, visited during her absence and small sums of money were secretly taken from her purse. She complained to the proper authority, but the money was never recovered. This undesirable condition caused concern and anxiety and an organized effort was made to discover the thief.

11. Dean Smith testified that Miss Kennard, student head-proctor of the hall, had told her that, sometime about March first, she had marked a two dollar bank note and placed it in a purse in the upper drawer of the bureau in her bed-room. The dean testified further that Miss Kennard had, at the same time, given her the serial number of the bill and a description of its secret marking. It disappeared from its hiding-place sometime before 6.15 P. M. of March 17th, the day of the athletic meet, and is said to have been taken after 4.30 P. M. of that day. Miss Barker was in the hall for a short time between the hours named. As hereafter found, this bill was afterwards discovered in her possession.

12. Miss Mearns, another student, while two fellow students,

Barker vs. The Trustees of Bryn Mawr College, et al.

of whom the relator was one, were present, is said to have placed in a book in her room, a large number of postage stamps, and then hidden the book. These stamps were afterwards, and before March 23rd, removed by some one during her absence. Miss Barker denied recollection of the occurrence. She was frequently observed in the rooms of other students during their absence.

13. It had long been the policy of the president of the College to impose the severe penalty of expulsion at a time when its object was absent from college on vacation for the considerate reason that she was thereby afforded the opportunity of making her own explanation of that which appeared to be her voluntary failure to return. March 23rd was the day of departure of all students who were going home to spend the Easter vacation. The relator and others were under suspicion in connection with the thefts mentioned and nothing had yet been accomplished sufficiently to connect a particular student with them. It was known that Miss Barker had arranged to leave the college in time to take the train west at Bryn Mawr station at 1.40 P. M. A last effort was, therefore, made on the morning of that day. A five dollar bank note was placed on the flat-topped desk in Prue Smith's study and a Miss Cadot, a senior student concealed herself in the bedroom closet with its door so arranged that she commanded a view of the money on the desk. The relator was induced to come to the suite. She did so, found the door open, knocked and, receiving no response, entered and found Miss Smith absent. She determined to leave a written communication, in connection with the matter which had brought her there, but had no writing materials with her and her own, in the adjoining room, had been packed in anticipation of her journey. She, therefore, looked around for such material,—first on the desk, where she saw none. She then found a scrap of writing paper in the basket along side it. She next entered the bed-room, opened the upper bureau drawer, took out Miss Smith's purse, or bag, of soft material and felt of it and, finding no pencil therein, it was replaced and the drawer was closed. She then turned and left the apartments. The money on the desk was not disturbed and nothing was taken from the purse.

We find that the relevant facts, already found, constituted, in the opinion of Dean Smith, sufficient basis for reasonable suspicion against the relator.

14. The president was absent on business and did not return to the college until March 26th. Soon after relator's visit to

Barker vs. The Trustees of Bryn Mawr College, et al.

Prue Smith's room, she was invited to come to the office of Dean Smith, did so and was there confronted by Miss Cadot and Miss Foote, president of the undergraduate association, in the presence of the dean. That which transpired at this interview, which lasted eight minutes, was taken down stenographically by a secretary who was in the office. The dean casually remarked to Miss Barker that money had disappeared during the year, the matter was being investigated and that she and others were under suspicion, and inquired further whether the relator was accustomed to open girls' top bureau drawers and search through them. She stated also that Miss Barker had, without reason for her presence, been seen in rooms of various students who were not her friends and asked for an explanation. The relator was also asked specifically to explain her visit to Miss Smith's room. She did so by stating that she had been commissioned by its occupant to obtain from the dean certain information, had finally received it and had gone there to make report, found Miss Smith absent and had, as already found, endeavored to leave a written communication for her, but had been unable to find writing material. She denied seeing the money on the desk. She made no mention of having seen Miss Cadot in the closet, although she now claims having done so as she turned to leave the bureau after closing the drawer. Miss Cadot, who was present and heard the explanation, did not interpose, or say that she had been in the room. The relator denied any recollection on the subject of her visits to the rooms of other students and asked for information specific as to the times, the rooms, and the names of their occupants, whereupon the dean assured her that the information would be obtained, and given later to her.

15. Subsequently, at about noon, Miss Barker voluntarily returned to the dean's office, expressed to that official her anxiety lest her mother should hear about the matter and volunteered assistance, if it were desired, in clearing it up, to all of which the dean replied that, under the circumstances, since the vacation was about beginning, it would be very difficult to get witnesses and she would have to go into the matter more fully after vacation when the relator would have an ample opportunity to present her own side.

16. Shortly, in less than an half hour, after she had left the dean's office, on this second visit, Miss Barker was publicly called out of class or recitation and instructed to go again to dean's office where, it was stated, she was wanted immediately. She did so,

Barker vs. The Trustees of Bryn Mawr College, et al.

remained eleven minutes, was there again confronted by Miss Foote and also Miss Kennard and a Miss Adair, the business manager of the College, in the presence of the dean and all that was said was again taken down stenographically by the same secretary. As the relator entered the office the dean informed her that she believed that she had some of the information for which she (Miss Barker) had asked and thereafter Miss Foote conducted the interview by questioning the relator in relation to her visits to certain rooms, all of which was answered in a way that shows such visits not to have been unusual. She was also asked about her presence in Miss Mearn's room when the stamps were placed in a book and replied that she did not remember the occasion. She asked if they did not want her to stay to clear up the matter and all assured her that such would not be necessary.

No copy of the transcribed notes taken at the first and third interviews in the dean's office was ever shown or furnished to the relator and, while a copy thereof was marked for identification at the trial, it was not offered in evidence.

17. Upon relator's departure, after this third visit, she was met in the corridor by Miss Kennard, who asked to see the money that Miss Barker had with her. She at once took out her purse, opened it and showed its contents, which included a two-dollar bank note. Miss Kennard seized the latter and, upon its examination, claimed it as her own and expressed a desire to retain it. Miss Barker denied such ownership and at first objected to surrendering it, but finally consented upon being given two dollars in exchange. Upon being asked by Miss Kennard where she had obtained the bill, the relator replied that she had received it in change from Miss Bunch, who, that morning, had purchased her ticket. Miss Barker was not aware at this time that any bill had been marked. At once after the meeting, Miss Kennard delivered a \$2 bill to the dean. It bore the serial number and showed the marking mentioned in our 11th finding. There was no testimony positively to show that the bill taken from Miss Barker was the one delivered to the dean, but, for the purposes of this case, we feel safe in finding such to have been the fact.

18. The relator then left for the railroad station and, before the departure of her train, made an effort to get Dean Smith on the telephone, but was unable to do so. She left with the person who, in the dean's absence, had answered the call, a message to the effect that, because she was unable to talk to the dean, she would immediately write to her from the train en route for home.

Barken vs. The Trustees of Bryn Mawr College, et al.

She did so, and the letter stated, in part, that "I wished to correct a statement made to Margaret Kennard about a quarter of one. I said that I had received a two-dollar bill from Laura Crease Bunch, the balance of a cheque for fifty dollars which I had given her to get my ticket home. I remember now that the change was only one dollar and thirty-one cents. I placed this in a pocket in which was the two-dollar bill in question and some other change. The two dollar bill and the change I received from a cabman a week ago Sunday" (March 13th.), "when I went to Dr. Branson's office. It was part of the change from a five dollar bill which I got from Miss Patterson. My mis-statement in regard to where I had gotten the two dollar bill was due to placing the two sums in the same pocket. The telephone number of the cab company is 513." Before Miss Barker left the college for home at least one student, who was not present at any of the three interviews in the dean's office, had already learned of them.

19. On the same day, March 23rd, the dean wrote to President Thomas, who was at the time in Boston, a comprehensive report of that which had transpired earlier in the day and enclosed a partial list of the students who had lost money, with the amounts taken, a written statement by Misses Kennard and Foote of the occurrences leading up to the interviews, and a copy of the transcribed stenographic notes of the first and third interviews. After stating that the relator had been the object of suspicion for some time, the letter goes on to say that the matter had been brought to a head that morning when "I gave her every chance, in the presence of the other students and alone, to explain these suspicious circumstances." It goes on to say that she "denies everything" and "would admit nothing, although she said she was anxious to have the matter cleared up. I did not in any way make a definite charge of stealing, nor did the students. We simply stated various suspicious circumstances and asked her for an explanation." This letter also contains certain observations and recommendations by the dean concerning the case.

20. On the following day, or March 24th, the dean, before her own departure on a vacation, wrote again to the president, addressing her at the college. This letter was received on the latter's return from Boston on the morning of the 26th, and merely enclosed certain additional material relating to the case. The testimony throws no light on its identity or character.

21. On March 26th, while at the college and before her

Barker vs. The Trustees of Bryn Mawr College, et al.

departure, later in the day, on another journey, the president, in the absence of the dean and Miss Kennard, wrote to Marjory C. Barker, the mother of relator, a letter, with which there was enclosed one of similar import to the daughter, stating somewhat inaccurately the then status of the case, giving reasons why she could not take it up for disposition before April 2nd and requesting Mrs. Barker not to allow her daughter to return to the college until she (the mother) had heard again from the writer who would communicate with her on the latter date, after which "if you wish to see me, I shall be very glad to see you." The letter of March 26th stated further that "all my information leads me to believe that we shall think it undesirable for her" (Miss Barker) "to return at all." The enclosed letter of even date to Miss Barker concluded: "In order that there may be no misunderstanding, I should like to repeat that you are not permitted to return to College until you hear from me again." After writing these two letters, President Thomas left Bryn Mawr and did not return until Saturday, April 1st.

22. Both letters of March 26th reached their respective addresses by due course of mail on March 30th and the mother, after a long talk with her daughter, who was seriously ill at the time, sent, on March 31st, a long despatch to President Thomas in which she explained her daughter's visits to the rooms of Prue Smith and other students and stated that the relator failed even to remember the Louise Mearns stamp incident and claimed herself to have been at different times the victim of the petty stealing in question. It sets forth further that Miss Kennard had promised her daughter an investigation and that the mother expected full restitution and expressed her own belief that there was no question of her daughter's innocence. The mother had discussed the \$2 bill incident with her daughter in the conversation, but did not mention it in the despatch.

Mrs. Barker, on the same day, by telephone or telegraph, appealed to Mr. Richardson, of New York City, a relative, Captain Teale, of West Point, a friend of many years, Mr. Rust, of Pittsburgh, a stranger to her, but who happened to be the father of a friend and classmate of her daughter, and Mrs. Sawyer, of New York City, another old friend of both mother and daughter, for help in her difficulty. Mr. Rust had been appealed to, however, by his own daughter, who seems already to have known of Miss Barker's trouble, no doubt because she and the latter had been traveling

Barker vs. The Trustees of Bryn Mawr College, et al.

companions from Bryn Mawr to Pittsburgh, on their way to their respective homes, so early as the evening of March 23rd, to interest himself in her case. All responded promptly. Mrs. Sawyer arrived at Bryn Mawr on March 31st, Mr. Rust and Captain Teale on April 1st and Mr. Richardson on Sunday, April 3rd. Miss Barker also wrote on March 30th and 31st concerning the matter to five fellow students and received replies from all.

23. President Thomas returned to Bryn Mawr on Friday, April 1st. On the following day, she first conferred with Dean Smith and read the transcribed notes of the two interviews of March 23rd in her office, which had been attended by Miss Barker. She then saw and examined at least the Misses Kennard, Foote and Cadot of the students chiefly concerned. She then talked to the secretary of the college and the housekeeper of Pembroke Hall. And she had before her the dean's letters of the 23rd and 24th, the two enclosures in the former, Miss Barker's letter to the dean of the 23rd, and Mrs. Barker's despatch of the 31st. Mrs. Sawyer had called to see her, but had been compelled to depart without being able to do so, leaving word, however, that she was anxious to return and confer with the president. Mr. Rust and Captain Teale had been granted brief interviews. The Misses Kirk, the relator's preparatory school teacher, had been seen. But Margery Barker, who had been a student at Bryn Mawr for well over a year and who had never yet had an opportunity to come in contact with its president, who had never seen, nor met, her and who did not know her, had not been seen.

It was at this stage of the case that President Thomas, without any ill will or malice, and in the performance of her duty, as she conceived it, after consideration, wrote to Mrs. Barker the letter of April 2nd in which it was said, in part:

"After very careful consideration, I have decided that it is my duty to write you that, in my opinion, it is not desirable for your daughter, Margery Barker, to return to Bryn Mawr College and that she will, therefore, not be readmitted." This letter constituted the "ultimate exercise of authority" by President Thomas under her power "to impose the more serious penalties for all non-academic offenses" and operated in the definite and final exclusion of the relator from Bryn Mawr College.

President Thomas testified that her final decision was based on a great many reasons of which the thefts in Pembroke were only one and not at all decisive.

Barker vs. The Trustees of Bryn Mawr College, et al.

Unfortunately this letter never reached its destination. Mrs. Barker of course anticipated its arrival because of the assurance contained in that of President Thomas to her, dated March 26th. After waiting some time for it, she communicated with the president, whereupon a carbon copy of the letter of April 2nd was mailed to her. It arrived at its destination on April 14th, when Mrs. Barker came at once to Philadelphia. The relator had preceded her by several days.

In later suggesting to Mrs. Sawyer, under the same date, however, that it was unnecessary for her to come again to Bryn Mawr, that lady was informed by President Thomas that "Nothing that you could say would alter my decision that it is unwise for Miss Barker to return to the College." Mr. Rust and Captain Teale received from President Thomas personal assurances of similar import.

24. We shall now hasten to the end of our general findings. The relator and her friends were strong in their conviction that a wrong had been done her and that, notwithstanding the oft-repeated protestation that no charges had been preferred against her by the college, the circumstances, the publicity which they had obtained and their covert insinuations against her character and honor, were, in effect, worse than direct charges; and they were insistent and persistent in their pleas and ultimate demands for fair play and an opportunity to be heard in defense against them. President Thomas continued to declare her open-mindedness and to aver her willingness to reconsider the case, and, if need be, revoke her decision of April 2nd, should its facts suggest the propriety of such action on her part. Many interviews and much correspondence ensued. She saw and heard Mrs. Barker at least twice and the relator as often. She called upon counsel for the latter. Mr. Richardson, Mr. Rust and Mr. DuPont saw her. As a result, she carefully reconsidered her action at least twice and both times reached the same conclusion. An eminent member of the bar, one of the trustees of Bryn Mawr College, was requested by the directors to investigate the case. He did so, saw many of the parties having knowledge of the circumstances and carefully reviewed it, but did not see Miss Barker, however. Mr. Rust saw and conferred with him on different occasions. This gentleman sustained the conclusion therein of President Thomas.

25. Under the Plan of Government of the College, the president's action was a finality and not subject to appeal to, or review

Barker vs. The Trustees of Bryn Mawr College, et al.

by, the Board of Directors. At the instance of the relator and her mother, or, at least, with their full knowledge and consent, Mr. Rust carried the case to the board, however. No objection was made to such being done, although the records of the institution showed no precedent for the action. He interviewed personally 13 or 14 of the 18 directors and, in anticipation of its regular meeting of May 20th, at the suggestion of Mr. Wing, one of its members, prepared most carefully a printed memorandum of the case. This brief stands out in the evidence as a monument to his distinterested zeal, persistency and loyalty. This tribute is his due when it is remembered that, prior to April 1921, he had never met, nor seen, Mrs. Barker and had met the relator only once, when, for a short time, in January of that year, she was a houseguest of his own daughter. A copy of this memorandum was enclosed by him in a personal letter to each director, some days before the meeting, which was very well attended.

The case was there carefully and thoroughly discussed, when, after consideration, the board decided that it was of the unanimous opinion that the discretion of the president in requesting the withdrawal of Miss Barker from the college had been properly exercised.

26. We find as facts that Miss Kennard, Miss Foote, Miss Cadot, Miss Adair and the private secretary, or stenographer, all of whom were present at one or more of the interviews of March 23rd in the dean's office, were not offered as witnesses at the trial, and that, as the principal inquiry in the case is directed to whether or not President Thomas on April 2nd properly exercised the discretion vested in her, or, as contended by relator, should have first given her further opportunity to be heard, the question of her guilt or innocence is not in issue; wherefore, and for the additional reason that such was expressly agreed upon at the trial, we have carefully avoided making any findings thereon.

DISCUSSION

Following our usual practice, we have made comprehensive general findings of fact so that, in case of review, the decision may be complete and, in itself, embrace all that may be required. Such findings are, furthermore, supplemented and, to a large extent repeated, by answered requests by relator and respondents for such. An examination of all discloses no serious disagreement between the parties concerning the major facts of the case, which, of course, eliminates necessity in this discussion of either making extended

Barker vs. The Trustees of Bryn Mawr College, et al.

reference to them or reconciling them with the evidence. The real difficulty in this case is, therefore, first to seek to determine from the conflict of authority just what is the law and then to apply it to the facts as they have been thus found.

The question of jurisdiction, being always a preliminary one, to be determined before a case is considered on its merits, and its lack having been raised against the relator by the answer and urged by the respondents ever since, must first engage our attention.

To sustain it, we are referred by her counsel to our own case of *Stambaugh vs. The Trustees of Bryn Mawr College et al.*, No. 129, June Term, 1919. It can scarcely be regarded as either precedent or authority, however. In that case, which was one of *mandamus*, the question of jurisdiction was not passed upon by the court and, for that matter, the petition was withdrawn and the suit marked discontinued before its issues of fact were tried. They also refer us to the first section of the Act of June 8, 1893, P. L. 345 and its amendments of April 28, 1899, P. L. 84, March 19, 1903, P. L. 32, and June 19, 1913, P. L. 526. It seems clear that this section of the act was intended, not to enlarge the right to the writ or to increase the wrongs for which it should be a remedy, but rather to designate the parties against whom the Court should have the power to make it run. The classification or number of such parties has been enlarged by each succeeding amendment, but the act was not meant, nor is it to be construed, to substitute *mandamus* for the writ of summons and the ordinary proceedings and trial: *Com. ex rel., appell. vs. Phila.*, 176 Pa. 588, 593; *Com. ex rel., appell. vs. Barker*, 211 Pa. 610. The construction for which relator contends would make *mandamus* a remedy even for the collection of a note from any defendant designated by the Act. The Act of 1893 and its amendments do not, therefore, in our opinion, confer jurisdiction here and we are compelled to look elsewhere for a determination of the question.

Originally a high prerogative and extraordinary writ, the right to it and the jurisdiction to issue it have ceased to depend upon the exercise of sovereign will, and it has come to be regarded as an ordinary civil process issued as of ordinary right in cases where it is applicable: 2 *Spelling on Extraordinary Relief*, section 1362, citing *Com. v Pittsburgh*, 34 Pa. 496. But it will not be issued where the writ would be unavailing: *Com. v Trustees &c.*, 6 S. & R. 508; *Com. ex rel. v Susquehanna Coal Co.*, 1 Lack. Jurist 137, as seems to be the case here. The expulsion occurred on April 2, 1921, nearly a year has since elapsed and, in regular course, the relator would, by now, have been in the junior class. The whole

Barker vs. The Trustees of Bryn Mawr College, et al.

situation has changed irrevocably. The clock can not be turned back. Its only effect would, therefore, be to fix a status, to determine an abstract, academic right.

Moreover, the relator was not a member of respondent corporation. Her relation to it was of a contractual nature. And obligations which rest solely upon contract will not be enforced by mandamus where there is no question of trust or official duty: 18 R.C.L. 129. Duties imposed upon a corporation, not by virtue of express law, or by the conditions of its charter, but arising out of contract relations, will not be enforced by mandamus, since the use of the writ is limited to the enforcement of obligations imposed by law: *Com. ex rel. Stern vs. Wilkes-Barre Gas Co.*, 2 Kulp 499; *Booker et al. v. Grand Rapids Medical College*, 156 Mich. 95; 120 N. W. 589. It would seem also that relator has other adequate remedies.

But, so far as the question of jurisdiction is concerned, the insurmountable difficulty which lies in the path of the relator arises out of the combination of facts that she was in no sense a member of defendant corporation, but the relation between herself and it was contractual in character, and it is a private corporation receiving no aid from, and owing to duties to the public. The earlier authorities on this aspect of the case are in hopeless conflict. See Note, 24 A. & E. Anno. Cases 890.

In *Com. ex rel. vs. Keim, et al.*, 15 Phila. 1, the petitioners for the writ were members of the defendant railroad corporation and the subsequent act of 1893 has settled the question there in controversy, that mandamus can issue in the case of a private corporation.

In *Com. ex rel. vs. Susquehanna Coal Co.*, supra, the peremptory writ was refused, on the merits of the case, but the court entertained jurisdiction on the ground, inter alia, that the obligation resting on the defendant was in the nature of a public duty. In *Com. ex rel. v. McCauley, et al.*, 2 Pa. C. C. 459; 3 Pa. C. C. 77, the respondent college had received pecuniary aid from the state, and in all the other reported Pennsylvania cases, to which we have been referred, in which the courts entertained jurisdiction by mandamus in suits between students and schools or colleges, the defendant institution was either a part of the public educational system, or received aid from the state. So far as we are aware, the exact question presented by the case at bar has not been decided in a reported Pennsylvania case.

Looking elsewhere, therefore, for guidance it is at once apparent that the conflict of the earlier cases continues and it would be idle, in this brief discussion, to consider many of the more recent cases. The leading one, in favor of jurisdiction, is *Baltimore*

Barker vs. The Trustees of Bryn Mawr College, et al.

University v. Colton, 98 Med. 623; 57 Atlan. 14, in which a law student, who had been expelled without notice, sought reinstatement. The University was, however, a state institution of at least the law school of which the relator was, by written agreement, a member. In fact the opinion states, as a fact, that he was a member of the University. Mandamus was there held to be the proper remedy for the stated reason that want of notice has always been regarded as sufficient ground for invoking the aid of mandamus in cases of membership in corporations organized for the purpose of business or profit, and it is generally held that the same rule also applies to the restoration to membership in a private corporation when no pecuniary interests are involved.

One of the leading cases holding the contrary view is *State ex rel., v. Milwaukee Med. College*, 106 N. W. 116, in which the relator, who had completed a course in dentistry and claimed to be entitled to a diploma, which was refused, sought by mandamus to compel its issuance by the defendant, which was also a state institution. The Supreme Court, in reversing, held that the case was clearly one of breach of contract and that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. It will not lie to compel a private corporation to perform its contract with an individual. "If mandamus will issue to enforce the performance of the contract between petitioner and appellant, no reason is perceived why it will not lie in any case by a person to enforce a contract with a private corporation."

And another such, and the last we shall mention, is that of *Booker, et al. v. Grand Rapids Medical College*, 156 Mich. 95; 120 N. W. 589,—a very well considered case. There the defendant was a strictly private corporation, conducted for private gain. The relators matriculated, attended courses for a year and were refused admission thereafter because they were negroes. They sought to compel reinstatement by mandamus. In reversing the lower court, which had issued the writ, much that was said by the Supreme Court applies exactly here. The opinion concludes: "If enforcement of the obligations of private corporations by mandamus is to be entered upon by the courts, we know of no rule by which it can be determined in what cases the writ should be refused. The apparent hardship of a particular situation is not a good reason for departing from the rule." A rule made to cover the exigencies of a particular case makes bad law generally; *Gorgas v. Saxman*, *appell.*, 216 Pa. 237.

Without further discussion of this interesting question, we,

Barker vs. The Trustees of Bryn Mawr College, et al.

therefore, hold with the weight of authority that, as stated in 18 R. C. L. 186, "where a student has been wrongfully expelled from a private incorporated institution of learning, mandamus will not lie to compel the corporation to reinstate him," and that we are, in consequence, without power to issue the writ.

Notwithstanding this conclusion we shall, however, for the reason set forth at the very beginning of this discussion, consider briefly the question in the case which goes to its actual merits. Was the relator wrongfully expelled?

And, before discussing it, we note that the reasonableness of the regulation that the college reserved the right to exclude at any time students whose conduct or academic standing it regarded as undesirable is not before us because such reasonableness was conceded of record by the relator. Also that it is settled law that the writ can be issued only to enforce the performance of a ministerial duty and not to control the discretion of the respondents. It can compel the respondents to act, but it cannot interfere with their action, or compel them how to act. Furthermore, the writ never issues in a doubtful case. Mandamus goes out only where there is a clear legal right in the relator and a corresponding duty upon the defendant: *Com. v. Fitler*, 136 Pa. 129; *Com. ex rel., appell., v. Kessler*, 222 Pa. 32.

And its consideration must be approached in light of the circumstances that Bryn Mawr College is not only maintained by a private corporation, but has in residence upwards of 400 students. The witnesses, the documentary evidence, the whole trial suggested that its atmosphere is high-class, its moral standards are elevated, its purpose is as much to build character as to improve the mind. Protection of its undergraduates against contaminating association or influence is but one of many ways to accomplish this purpose. It was, no doubt, in furtherance of this purpose, that the regulation in question was promulgated. Students could be excluded, not when their conduct was undesirable, but when "it regarded" such undesirable. Neither expressly, nor by reasonable implication, was the student to be entitled to have charges preferred with an opportunity to answer them, or to a hearing.

Did anything occur in this case by which it was made exceptional in this respect? We think not. The positive oral testimony and the documentary evidence both establish that, at no time, in the Dean's office or elsewhere, were any charges ever preferred against the relator. She says so herself and complains only that, when under suspicion, the circumstances of the calls upon her for an explanation raised an inference, or created an innuendo, that "was equivalent to preferring charges against her." An inference must

Barker vs. The Trustees of Bryn Mawr College, et al.

be based upon a fact and not upon its denial. Nor can we subscribe to the conclusion drawn by relator. It may well be that more tact or diplomacy might have been used under the circumstances and that it was ill-advised publicly to have called her out of class for the third interview, but the purpose of both calls was proper. They showed consideration for her. The college had at the time the absolute right to exclude her if it regarded her conduct as undesirable and she can not be heard to complain that, when suspected of improper conduct, she was afforded by the dean at least two opportunities for explanation.

Moreover, those present at the interviews were properly there. Other than the officials of the college, they were only Miss Kennard, the head proctor of the hall, Miss Foote, the president of the Undergraduates' Association, and Miss Cadot, the senior who had hidden in Miss Smith's room. Their presence was necessary if the investigation was to be fair and complete. The publicity which the matter afterwards obtained is, of course, to be regretted, but, it may be, that the five letters of March 30th and 31st, which the relator wrote to her fellow students, may have been a helpful factor in this connection. We can find nothing in these interviews, or any of their circumstances, which savored of preferring charges against her, or bound the college, as a matter of law, to give the relator a hearing before subsequent disciplinary action was taken.

It must not be lost sight of that President Thomas testified that her final decision was based on a great many reasons of which the thefts in Pembroke were only one and not at all decisive. Her letter to Mrs. Barker of April 2nd and the statement enclosed with it, when carefully read, indicate such to have been the case. As to all these, except the matters involved in the interviews in the dean's office, it is not contended that, as a matter of legal right, the relator was entitled to be heard. It is not denied that, as to them, the President's power was absolute. We fear that, in light of all the testimony, there is a disposition on the part of the relator to place too much stress upon the relative importance in the case of the subjects which were discussed at those interviews and to draw a distinction as to them which is not justified.

But let us assume, for the moment, that, as it is stated in relator's brief, "the action of the dean in interrogating the child in the presence of a stenographer and student witnesses was equivalent to preferring charges against her and ipso facto bound the college to give her a fair hearing before any disciplinary action was taken against her."

It cannot be reasonably or successfully urged, especially in the absence of any prescribed method of hearing, or form of procedure,

Barker vs. The Trustees of Bryn Mawr College, et al.

that such must be conducted with all the dignity and form incident to a trial in court. The latter are largely prescribed by the constitution, the statutes and the common law. The authorities of a great educational institution like the defendant college might find much of their time occupied by the trial of such cases if, every time a student were suspected of improper conduct, he was called upon for an explanation and the fact became noised abroad, he would, ipso facto, be entitled, as a matter of absolute right, to a formal hearing. The only prudent thing for it to do would be to act without first communicating with him at all.

But, after all, so far as the matters investigated at the interviews in the Dean's office are concerned, did not the relator have a fair hearing in this case both before and after disciplinary action was taken against her?

On the morning of March 23d she enjoyed three separate opportunities for explanation, of which two were afforded by the respondents. At the first, she knew that Miss Cadot, who was present, had seen her in Prue Smith's apartments. For the reason she assigns, she was not frank enough to inform the Dean of that fact, but, if it is true that she had closed the bureau drawer and turned to leave before she observed Miss Cadot, we must assume that the latter would have told the truth and corroborated her if she had been asked to do so. At the second but little occurred, but it has not escaped our observation that, while the Dean contradicts in the answer relator's recollection of what was said, the former, it may be through an oversight of counsel, was not given an opportunity to do so at the trial.

At the third, all that the relator had to say was heard. At none did she express a desire either to examine those present or, then and there, to produce witnesses in her behalf. As to the \$2 bill incident, she submitted her explanation in writing, which did not, however, but for the reason that she gave, coincide with her earlier statement to Miss Kennard. Mrs. Sawyer saw and talked in her behalf to the Dean on March 31st. Captain Teale and Mr. Rust, her zealous advocates, conferred with both the president and the dean. Even her preparatory school teacher called upon the president before the action of April 2d was taken. The president's letter of March 26th had already told Mrs. Barker that after April 2d, "if you wish to see me, I shall be very glad to see you." Mr. Richardson called on the president on April 3d and she heard what he had to say. The relator came about April 9th, and her mother followed in a few days. Counsel was retained on April 12th. Then followed the long series of interviews and conferences with President Thomas, mentioned in our findings of fact, in which all that

Barker vs. The Trustees of Bryn Mawr College, et al.

the relator, her mother, Mr. Rust, and Mr. Dupont had to say was listened to patiently. At least twice did the president again go over the entire case.

Mr. White came into it on April 25th. He, too, carefully investigated it and heard Mr. Rust's earnest presentation of it at least twice. And finally the board of directors, who received their first impression of the case from Mr. Rust and had before them his comprehensive and ably prepared memorandum of it, a brief that presented the matter very skillfully and in a light most favorable to the relator, gave it their careful consideration.

It is true that the decision of the president of April 2d remains unchanged, but we venture to suggest that it is rarely, if ever, that such a matter receives so thorough consideration, so full and fair a hearing. Not once has the relator, or any one on her behalf, named a witness that she desired to call. There is, of course, no insinuation even that any of the officials of the college was actuated by any improper motives, or influenced by any unworthy considerations. We are unable to see what right, substantial or otherwise, she has been denied. She now demands that which she had already enjoyed.

In our 23d general finding of fact is to be found a comprehensive statement of all that the president had considered, or had before her, when she took the final action of April 2d, and all that it is necessary to say in this connection is that she thereby exercised the official discretion vested in her, her action is presumed by the law to have been regular, and it is of no interest whatever whether we agree or disagree with her conclusion. In the exercise of that discretion she was not subject to the control of the court. It has nothing whatever to do with its result, or the mental processes by which it was reached.

It remains only to direct attention to the law bearing on this branch of the case. 11 Corpus Juris 998 lays down the general principle that a college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence, but a careful study of the principal case cited to support the text shows the defendant institution to have been a state university and indicates that the question of procedure in such cases was not expressly decided. Judge Sadler's charge to the jury in *Com. v. McCauley*, 3 Pa. C. C. 77, does, however, so declare the law, but, in that case, the defendant was receiving pecuniary aid from the state which imposed upon it, at least by implication, duties toward its citizens.

To the contrary, in *Miller, appel., v. Clement*, 205 Pa. 484, in

Barker vs. The Trustees of Bryn Mawr College, et al.

which the relator had been expelled from a public school in Philadelphia and sought reinstatement by mandamus, definite charges had been made against him and the committee of the board, to whom the matter had been referred, held an ex parte hearing, declined to hear witnesses on his behalf, and then expelled him. The full board afterwards refused a hearing by it. The peremptory writ was refused. The relator is, therefore, on the merits of the case, also not entitled to a peremptory writ. She was not wrongfully expelled.

From the facts thus found, and for the reasons given, we, therefore, draw the following

GENERAL CONCLUSIONS OF LAW

1. Where a student is wrongfully expelled from a college which is maintained by a private corporation of the first class that obtains all its funds from private benefactions and charges made against those who attend its courses and receives no pecuniary aid from the state or the public, and the relation between the student and the college is solely contractual in character, the Court of Common Pleas does not have jurisdiction to issue a writ of mandamus to compel her reinstatement

2. In such case, the law affords other adequate remedy for the wrong done.

3. When a regulation of such a college, and one of the conditions under which such student obtained entrance to it, provides that "the College reserves the right to exclude at any time students whose conduct or academic standing it regards as undesirable," the college is not required, before it excludes a student whose conduct it regards as undesirable, to prefer charges and vouchsafe to her either trial or hearing.

4. Our third conclusion is not affected or changed by the fact that, before taking action, the college afforded the student, who was reasonably suspected of improper conduct, opportunity for explanation, even though the circumstances that she had been suspected and invited to explain her conduct became known to the other students of the institution.

5. To inform the relator that she was suspected of improper conduct and to invite her to explain it, as such was done in this case, without more, did not operate, by either insinuation or innuendo, inference or implication, as a charge that she had been guilty of such impropriety.

6. The court, even if it has jurisdiction, which, in our opinion, is not the case, is, under all the circumstances, without power either to interfere with or control the exercise by President Thomas of the official discretion vested in her, or to strike down or set aside the decision which followed its exercise by her.

7. A peremptory writ of mandamus must be refused and the respondents are entitled to judgment in their favor.

In the Court of Common Pleas of Montgomery County**School District of Royersford vs. Haines.**

Defendant was about to erect a garage in the vicinity of one of the school buildings of the plaintiff. The plaintiff then filed its bill in equity, asking that the defendant be restrained from erecting said building, that the defendant was going to erect a public garage, repair shop and service station, and that the same would endanger the lives of the children attending the school, and that the establishment of a business in that locality would be illegal against public policy. The plaintiff failed to prove the allegations alleged as to the erection of a public garage, and failed to show that this would be a nuisance, therefore, since they have failed to meet the allegations with proof, the bill must be dismissed.

No. 4, June Term, 1921.

Equity.

E. L. Hallman and Henry Freedley, Attorneys for Plaintiff.

Harry I. Hiestand, Attorney for Defendant.

Opinion by Miller, J., November 14, 1921.

This cause came on for final hearing on bill, answer, replication and proofs and, after hearing the evidence and arguments of counsel, we find the facts and draw therefrom the conclusions of law which follow.

GENERAL FINDINGS OF FACT

1. The complainant maintains a public or common school, known as the "Adams School," on a lot of ground situate on the north-easterly side of Fourth avenue, in the Borough of Royersford, in this county, which lot extends from Washington street, on the north-west, to Spring street, on the south-east.

The present entrance to the school building is on its north-westerly face and it is reached by a foot-walk leading out to Fourth avenue. The building is three stories in height, 61 feet wide and 88 feet long. Its longer side is parallel with Spring street and 69¼ feet from its proposed north-westerly curb line. Its first floor is about 10 feet above the street level. The building stands 52¼ feet from the north-easterly curb line of Fourth avenue. The school is now attended by 317 pupils. The school term covers a period of nine months. The school is in session during the usual hours.

2. Spring street, to the north-east of Fourth avenue, is 57 feet wide and, while laid out and opened, is without sidewalks or curb and its bed has never been graded and paved or macadamized. It is now but a dirt road. No building, other than the Adams School, is now erected on either side of Spring street, between

School District of Royersford vs. Haines.

Fourth and Fifth avenues. Fourth avenue, to the south-easterly of Spring street, is in substantially the same unimproved condition.

3. The defendant, William Haines, owns a lot of ground, having a frontage of 50 feet, situate on the south-easterly side of Spring street, $126\frac{1}{2}$ feet north-easterly of the curb line of Fourth avenue, whereby its south-westerly side line, if extended across the street, is approximately identical with the north-easterly face of the school building. This lot and the street in front of it are on the same elevation.

4. Both lots are in the remote outskirts of the built-up portion of the town. At present there are no improvements of any kind, in the rectangular block, bounded by Fourth avenue, Spring street, Fifth avenue, and Arch street, in which defendant's premises are located. It is now a commons, overgrown with weeds and bushes, and containing a wild ravine. There are no building restrictions in the title to defendant's lot and the character of the neighborhood, in which it is located, whether residential, business, or industrial, remains for future development.

5. The defendant purposes building on his lot, 27 feet back of the proposed curb line and 15 feet inside the property line, a one-story, brick building, 48 feet wide and 64 feet deep, with a single entrance, facing the street, which will be large enough to hold or accommodate sixteen automobiles and, when it is completed, he intends to use it only as a semi-public, club, or community garage by renting space therein for the storage of pleasure cars when they are not in use. Each tenant will be provided with a master key to the lock in the entrance door and will care for his own car. No one will be employed about the premises; a repair shop will not be maintained thereon; and no repairs will be made on the premises, except, possibly, such minor and incidental ones as owners may make to their own cars; gasoline and oils will be neither kept nor sold or furnished by him on the premises; cars will not be kept there for hire; and the place will not be used at all as a service station for automobiles, or motor trucks. The defendant does not intend to use his building as a strictly public garage, as that term is commonly understood and used. It is not intended, in any respect, to accommodate the general public.

6. The defendant graded his lot in anticipation of erecting his building and while he was engaged in excavating for the foundations thereof, he received two notices from the complainant to the effect that it objected to the execution of his purpose. He stopped

School District of Royersford vs. Haines.

work upon receipt of the second notice and has suspended operations until the rights of the parties could be adjudicated.

7. The complainant thereupon filed its bill alleging that the said defendant had started upon his said lot the erection of a public garage, repair shop and service station for automobiles and motor trucks and proposed to establish and maintain there a permanent business of that character; that the same would draw and accumulate automobile vehicles in the street in front of said school; will endanger the persons and lives of the children attending said school; distract and disturb them in their studies; and personally (?) injure the public service in the conduct of said school. It further alleges that the establishment of such business in such locality would be illegal and against public policy; wherefore it prays for an injunction, specifically, and relief, generally.

8. Fourth avenue, to the north-west of Spring street, and Spring street, to the south-west of Fourth avenue, are both improved thoroughfares and the motor vehicle traffic on them is heavy. At present, it is very light on Spring street to the north-east of Fourth avenue. The erection of the defendant's building and its use for the purpose which he intends will, of course, increase to some extent such traffic on all three, and especially on Spring street, between the garage and Fourth avenue.

9. We find from the weight of the evidence, however, that the increase in traffic, caused by the location of defendant's garage and its proposed use, will not either menace or be dangerous to the lives and limbs of the children attending the Adams School or unreasonably interfere with its ordinary operation. Furthermore, such increase of traffic will be upon the public streets of the borough, away from the defendant's premises, and at all times subject to such general and reasonable traffic rules and regulations as the local authorities may adopt and enforce.

10. At the garage, a driver of an incoming car will be required ordinarily to stop in front of the building, alight and unlock and open the entrance door, then return to his car, start its motor and drive inside. A driver of an out-going car will ordinarily be required to drive outside, stop, alight, return to the garage and close and lock the entrance door and then go back to his car and start its motor, before he drives away. In either case the driver may not stop his motor before he alights. If he does not, its being started up again will be obviated. There will be some noise attendant upon both, depending upon the care and skill of the drivers, as there

School District of Royersford vs. Haines.

will be to the passage of cars up and down Spring street in front of the school and to the signalling by those going toward Fourth avenue of their approach to that street. Cars will be washed inside the building; tires will be changed, and minor repairs and adjustments will be made by owners to their own cars. It may be that, occasionally, motors will be raced, cut-outs will be opened, and horns will be blown. In view, however, of the distance away of the school building and its higher elevation and the fact that but sixteen automobiles are to be accommodated in the defendant's building, the noises incident to these various operations in and about the same will not be unreasonable in either duration or loudness and will not attract the attention of either teachers or pupils in the school building, or distract and disturb the latter in their studies and recitations, nor, if the school is properly disciplined, should they cause the pupils to look up from their studies, or run to the windows, which are high above the floor.

11. We find from the weight of the evidence, that the occupants of the school building will suffer no serious annoyance or discomfort from smoke or the odor of gasoline or burned oil coming from the defendant's building.

12. It was not shown that the borough had established a safety zone or placed any speed limit signs in the vicinity of said school.

13. No application to amend was made and the case was heard on the bill as filed.

14. The complainant failed in its proof that the defendant intended to use his building, when erected, as a strictly public garage, repair shop, and automobile service station.

The Board of School Directors is to be commended for its zeal in the protection and safeguarding of the pupils under its care, but we feel that it has been premature in filing its bill. If, after the defendant's building has been erected, it shall be used differently from the way now contemplated and so as to create a nuisance, the Board may then assert its rights and file another bill.

Under the facts now before us and thus found and referring to our own recent case of Long et al. v. Loper, we must and do therefore, draw the following

CONCLUSIONS OF LAW.

1. The relief afforded by a decree in equity must conform to the case as made out by the pleadings as well as to the proofs. Every fact essential to entitle a plaintiff to the relief which he seeks

School District of Royersford vs. Haines.

must be averred in his bill. Neither unproved allegations nor proof of matters not alleged can be made a basis for equitable relief. Neither allegations without proof, nor proof without allegations, nor allegations and proof which do not substantially correspond, will entitle complainant to relief, unless the defect be remedied by amendment. A master who finds that there is nothing in the testimony to sustain a bill as it is filed, should report a decree dismissing it.

216 Pa. 1; 270 Pa. 144; 72 S. C. 209.

2. The complainant failed to establish the fact that the business to be carried on by the defendant in the building to be erected will constitute a nuisance. If his business be lawful and carried on reasonably and does not affect the health, comfort or ordinary uses and enjoyment of neighboring property, it cannot be a nuisance in fact or in anticipation, and the courts cannot interfere with it.

57 Pa. 274.

3. Defendant's garage will not be either a nuisance per se, or a public nuisance.

269 Pa. 246.

4. Neither the establishment and maintenance of the business in accordance with defendant's purpose, nor the use to which he intends putting his building, after it is completed, is, even in its locality, a public or private nuisance, nor is it illegal or against public policy.

5. The courts deal with people's rights, not with questions of mere policy, local or general.

57 Pa. 274.

6. Defendant is engaged in the exercise of a universally recognized right of property. He is about to improve it. Before another can successfully ask equity to interfere therewith on the ground that its use will constitute a private nuisance by such a powerful instrument as an injunction he must show such a clear right in himself as to warrant that interference.

7. The complainant is not entitled to an injunction. The court ought not to interfere in cases of nuisances where the injury apprehended is of a character to justify conflicting opinions, whether the danger will in fact be ever realized.

57 Pa. 289.

8. The bill should be, and is, dismissed.

9. The complainant should pay the costs.

Youngjohns vs. Roop.

AND NOW, November 14, 1921, after final hearing and mature consideration, it is ordered, adjudged and decreed that the prothonotary mark these findings of fact and of law and the requests for such findings, as presented, with the answers thereto, filed, thereby to become a part of the record in the case, and enter a decree nisi in accordance therewith.

The prothonotary is further directed to give notice to counsel in the case, as required by the rules of equity practice, and that, unless exceptions thereto are filed within ten days of this date, a final decree will be entered by him in accordance with the foregoing conclusions.

In the Court of Common Pleas of Montgomery County

Youngjohns vs. Roop

Plaintiff bought a property subject to a lease which had three years to run. Defendant upon leasing the property installed a number of conveniences, and according to the testimony, informed his landlady of the improvements he intended to make, with a reservation of a right to remove these improvements at the expiration of his lease. The bill asks for a preliminary injunction to restrain the removal of the improvements.

Under the law a restriction of this kind would be sufficient to prevent the issue of preliminary injunction. The question to be determined is always what was the arrangement between the landlady and defendant at the time that certain personal property or fixtures were added to the premises. The rule for preliminary injunction must be dismissed.

No. 1. February Term, 1922.

Equity.

Kenneth Moore, Attorney for Plaintiff.

Norwood D. Matthias, Attorney for Defendant.

Opinion by Swartz, P. J. March 22, 1922.

The plaintiff purchased a property subject to a lease held by the defendant.

The bill alleges, that the defendant proposes to remove certain improvements and fixtures without authority of law.

The defendant answers, that the improvements and fixtures were placed into the building under an oral agreement with the landlord that they could be removed at the end of the tenancy.

1. The defendant took possession of the premises under a written lease for a term of ten years.

2. The first story of the building was used as a plumber's shop and the second and third stories were prepared by the tenant for apartment rooms.

Youngjohns vs. Roop.

When the tenant took possession there were no conveniences of any kind in the building. There was no heat, light or toilet and no range or wash-stand.

3. The tenant placed a steam heater in the cellar and supplied radiators and connecting pipes for heating the first and second story. He supplied coal and gas ranges and circulating boilers for the second and third floors. He placed a toilet upon each of these floors and a wash-stand on the second floor. He also introduced electric light fixtures, consisting of wires and cords attached to bulbs. The radiators and heating pipes were not attached to the walls or partitions of the building. The pipes passed from the cellar to the first and second stories by holes made through the floors. There was no steam heat introduced into the third story.

4. The weight of the evidence discloses, that before each improvement was introduced into the building the tenant obtained permission from his landlord under the verbal agreement, that the improvements could be removed at the end of the term, provided no injury was done to the building and it was left in the same condition that the tenant found it at the time he took possession.

5. There is no provision in the written lease that any improvement made by the tenant must remain at the expiration of the lease.

6. When the plaintiff purchased, and before he made settlement, he knew that the defendant held a lease that had nearly three years to run. He made an effort to buy out the tenant, but the parties could not agree upon terms. The tenant notified him that the improvements and fixtures would be removed, under the agreement he had with the landlord. At the sale to the plaintiff some reservations were made in favor of the defendant, but not to the extent now claimed by the tenant.

DISCUSSION.

The defendant testified that he obtained permission from his landlady as he introduced into the building each improvement, and that it was distinctly agreed, that any and all improvements and fixtures supplied by him could be removed at the end of his term.

This is denied in some parts of the landlady's depositions, but upon the whole they seem to sustain the tenant's contention.

She testified that she told the tenant when he put in the steam

Youngjohns vs. Roop.

heater, that "if he took it out he must leave the building in as good a condition as it was when he came there." She also testified, that she told Mr. Roop, "that if he took out the improvements and fixtures he must leave the property in the condition when he came there, and that he must not damage the wall's."

When the tenant took possession the building was bare of all improvements. For this reason the rent was placed at a very low figure.

The heater, radiation steam pipes, water closets, wash-stand and ranges can all be removed without defacing or injuring the building. They were so placed into the building with the intent and purpose to remove them.

Equity has jurisdiction to restrain a tenant from unlawfully removing improvements and fixtures. The remedy at law is not adequate; *Denny vs. Brunson*, 29 Pa., 382; *Wetherell vs. Gallagher*, 211 Pa., 306. This question was clearly settled in *Isman vs. Hanscom*, 217 Pa., 133. This case also decides, that where a landlord and tenant stipulate as to the ownership of improvements introduced by the tenant, he may remove them regardless of the rights of the parties at common law. The question of trade fixtures does not enter into the case.

An article which would otherwise be deemed a fixture may by the understanding of the parties become a chattel; *Sampson vs. Graham*, 96 Pa., 405.

The right of a tenant for years to remove what are called fixtures during his term has been generally recognized. The true criterion has been held to be the mention on the part of the tenant at the time he placed them upon the property that he intended to remove the fixtures during his term. The manner of their annexation is no longer the test; *Carver vs. Gough*, 153 Pa., 225.

A steam heater introduced by the tenant may be treated as a chattel, especially so under an agreement for its removal; *Wilkinson vs. Kugler*, 153 Pa., 238.

Radiators and steam pipes do not become a part of the realty; *National Bank of Catasauqua vs. North*, 160 Pa., 303.

Heaters and gas fixtures although appurtenant to a house are personal property and do not pass under a sale of the premises; *Heysham vs. Dettre*, 89 Pa., 506. This case also decides that such improvements are the subjects of a parole agreement, and their ownership must be determined by the contract of the parties.

The declared intention of the party before the improvement

Youngjohns vs. Roop.

or chattel is annexed is the important criterion in determining whether it becomes a part of the realty; *Benedict vs. Marsh*, 127 Pa., 309. Where the written lease is silent upon the subject and a parole agreement fixes the right to remove the chattel, the tenant's claim cannot be defeated.

While the rights of the tenant under the testimony are not free from all doubt, still the claim of the plaintiff is not so clear as to demand interference by preliminary injunction.

A preliminary injunction is never granted where the complainant's right to the relief is doubtful; *Thowron vs. Railway Company*, 174 Pa., 366.

It may be, that upon a final hearing the plaintiff can establish a case that will entitle him to a permanent injunction. Therefore we can not dismiss the bill.

This conclusion may leave the respective parties somewhat in a dilemma as to the future course each should follow, but we cannot avoid the difficulty. To take the property out of the hands and possession of one party and give it to the other is not the office of a preliminary injunction.

CONCLUSIONS OF LAW.

1. The Equity Court has jurisdiction to entertain the complaint.

2. The plaintiff has failed to establish his right with such clearness that entitles him to a preliminary injunction restraining the removal of the articles named in the bill and testimony.

AND Now, March 22nd, 1922, after hearing and due consideration, the preliminary injunction prayed for is refused.

In the Court of Common Pleas of Montgomery County

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

The plaintiff, a corporation, duly empowered to supply electric current to the Township of Upper Gwynedd, filed its bill against the Borough of Lansdale, and C., a corporation which had entered into a contract to be supplied with electric current from the municipal plant of Lansdale, for an injunction to restrain the defendant from furnishing electric current to C. whose plant was located in Upper Gwynedd township.

The Borough of Lansdale had also entered into a bailment lease with C. for the sale of certain motors which were necessary for the operation of C.'s plant.

Exceptions were taken to the jurisdiction of the Court of equity in this matter, but there is nothing under the Act governing public service commission, giving that commission jurisdiction over boroughs which engaged in selling electric current, therefore, the Court has jurisdiction. And in supplying current a municipality acts in the same capacity as a private corporation, therefore, it is entirely legal for the Court to entertain the bill and restrain the borough from doing that which it has no right to do; first, the right of entering into a commercial enterprise by selling motors and electrical equipment under a bailment lease, such bailment lease is absolutely void; and the said borough has no right to serve current in a territory in which a corporation duly chartered is given superior right to serve, and is ready and willing to supply such current, and it is doubtful if the defendant borough has a right to supply any electric current to others than those immediately adjacent to said borough. The defendant borough is, therefore, restrained from supplying current to C.

No. 2. June Term, 1921.

Equity.

Hearing on bill, answer, replication and proofs.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Samuel D. Conner and Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Swartz, P. J., January, 24, 1922.

The plaintiff company has the chartered right to supply electricity to the inhabitants of the township of Upper Gwynedd, in Montgomery County.

The borough of Lansdale owns and operates an electric plant and furnishes electric current to consumers outside of its borough limits in said township of Upper Gwynedd. Such service includes the construction of lines and the supply of current and power to the other defendant, the said W. Frank Vaughn, at his brick plant.

The plaintiff contends, that such service to Mr. Vaughn, by the said borough, is unlawful, and the bill prays for a decree restraining its continuance, and also prays for an order "restraining the said borough from constructing any power and transmission lines, in said township of Upper Gwynedd, and from transmitting, delivering and furnishing electricity to such portions of the township wherein the complainant has extended and is extending its equipment to serve the inhabitants."

The defendants answer, that the borough has the authority to

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

do what it is doing, under the provisions of the Borough Code of 1915.

FINDINGS OF FACTS.

1. The borough of Lansdale was incorporated under the general borough Act of 1851. It has a population of almost five thousand, and an area of one square mile.

It is surrounded by four townships. Hatfield Township bounds the borough on the north, Upper Gwynedd on the south, Towamencin on the west, and Montgomery and Upper Gwynedd on the east.

The four townships embrace a territory of almost forty-two square miles, and Lansdale is located near the center of this entire surface area. The four townships are each of about equal size.

2. This territory is largely a farming community. There are some towns and villages, but none in close proximity to Lansdale. Hatfield Borough and the borough of North Wales are each about two miles from Lansdale. West Point, in Upper Gwynedd, is about three miles distant.

3. There are some manufacturing plants within the boundaries of Lansdale. Those without, but close to the borough limits, are more numerous.

4. Letters patent were issued to the Upper Gwynedd Electric Company, on September 28, 1912, to manufacture and supply light, heat and power, by means of electricity, to the Township of Upper Gwynedd.

On December 20, 1913, there was a merger of the Upper Gwynedd Company with the plaintiff corporation.

5. In 1910 the plaintiff company purchased the rights, property and franchises of the E. K. Freed Electric Company, which had its power plant in the borough of North Wales. At that time the Freed Company had lines running from the said borough into Upper Gwynedd Township. It supplied electricity to various consumers in said township. Its lines extended into West Point, a large village located near the southwestern end of the township. The plaintiff company, after this purchase, made extensions from the Freed Company's existing lines. These radiated from the four sides of the borough of North Wales.

6. The plaintiff company made no constructions or extensions northward into Upper Gwynedd toward Lansdale until about 1919. That is, three years ago they continued their line to the Bailey Body

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

Works, in Upper Gwynedd, beyond North Wales Borough, and two years ago they went northward toward Lansdale as far as Beaver Road. From Beaver Road they continued the line to a public road near the point where said road crosses the Reading Railway tracks. This extension was built late in 1920 or early in 1921. It served two manufacturing plants, at the point where the said public road crosses the railroad. No further construction or extension was made by plaintiff until the question of serving electric light and power to the Vitrified Shale Products Company arose. However, the plaintiff corporation, on March 31, 1920, had authorized the construction and continuance of this line to Church Road and along Church Road towards the Chalfont line, its objective destination. We have given the actual status of the plaintiff company as to its existing lines in Upper Gwynedd as they appeared early in 1921.

7. The borough of Lansdale constructed its electric plant in 1899. It started with a capacity of 90 kilowatts. In 1906, the capacity was increased to 250, and in 1916 it added 500. It is now engaged in increasing the power by 1,000 kilowatts. When this addition is finished the capacity will represent 1,750 kilowatts. This last increase is necessitated by the increased requests for light and power, and also to provide for any emergency which may result from a breakdown of motors or other machinery.

The cost of this last addition is estimated at \$65,000.

8. As early as 1899 Lansdale constructed electric lines beyond the borough limits. In that year it ran a line eastward along the Welsh Road. This highway is the dividing line between Montgomery Township and Upper Gwynedd. The line was built on the Upper Gwynedd side of the Welsh Road.

In 1912 a line was constructed on the Welsh Road northwestwardly, and in 1913 the line was continued toward Orvilla, in Hatfield Township, and about three or four years ago was again extended.

A line was constructed from the Welsh Road down the Church Road in 1914, and later was continued to a point south of Hancock Street about 700 feet from the Shale Products plant. In 1920 a spur was carried from Church Road to the pumping station on the Pennbrook Park development.

The farmers' line, running southwestward from Lansdale, started about 1912, and the Kulpsville line, in the same locality was constructed about 1917. The Gun Club line, in Upper Gwynedd, was built in 1914. The Hospital line, Foundry lines, and the line extend-

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

ing toward Chalfont, in Bucks County, are located in Hatfield Township. There are other lines and extensions in the four townships. The total mileage of constructions in said townships surrounding Lansdale is over thirteen miles. In Upper Gwynedd alone the mileage of the existing lines is over three miles. The Farmers' line, in Towamencin Township, is apparently the longest, being three miles long.

8. Some of these lines are owned by individuals or the customers, who are served by the borough. The borough, however, owns outside of its limits about six miles of pole lines.

Lansdale keeps in repair, at its own expense, all lines, including those now owned by others. It has taken no indemnity from the private owners against any damages the borough may be compelled to pay by reason of accidents. The borough has liability insurance for its protection, but the character and extent of such insurance is not disclosed, nor the cost of the same to the borough.

9. In 1918 the borough constructed lines to transmit electricity to municipalities located beyond the four townships surrounding Lansdale. Proceedings in equity were commenced by a taxpayer to restrain these efforts to supply the boroughs of Hatfield and Chalfont. In *Day vs. the Borough of Lansdale*, 35 Montg. C. L. R. 27, we filed an order restraining the borough from carrying out and continuing these undertakings in the two boroughs named. The plaintiff company then purchased from Lansdale the line running to Chalfont. In our opinion we expressed doubt whether a borough could, under the law, engage in an extensive commercial enterprise, such as the borough of Lansdale was conducting.

10. Subsequent to the final decree in the *Day* case, Lansdale extended some of its lines in the four townships to points more remote than the termini existing in 1918, especially so in the township of Upper Gwynedd.

11. Pennbrook Park is a large building lot development. The plot was staked out thirty years ago. Two drafts of the lots and streets were recorded, one twenty years ago, another five years later. There are now about 12 or 13 houses upon the tract. Streets are laid out and opened to public travel. Gas and water pipes were put down and the streets were graded. Some few cement side paths are laid. The tract is located in Upper Gwynedd Township. These streets or roads have not been accepted by the township as public highways.

12. Pennbrook is located on the east side of Church Road,

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

between the railroad on the south and Welsh Road on the north. Church Road runs parallel to the eastern boundary line of the borough and the distance between these parallel lines is 1,900 feet. There are some buildings along and near the borough line, but no other improvements between Church Road and the said borough line, save two farm buildings and several houses on Hancock Street.

Blue Springs Lake is to the northeast of Pennbrook Park. This is another experimental lot development that shows no signs of life and is without a single house. Pennbrook Park has a swimming pool formed by damming up a small stream. The lower section of Pennbrook Park is about equidistant from Lansdale and North Wales Borough. But in the section of Pennbrook the houses now erected are nearer to Lansdale than to North Wales.

By going along Church Road to Welsh Road and then following the latter, a pedestrian has the use of paved walks all the way to Lansdale, but some, however, are made with ashes. The people living in Pennbrook generally go to Lansdale for their groceries and supplies.

Pennbrook is in no sense an outgrowth or overgrowth of Lansdale. It is not an overflow or spill-over beyond the borough lines. It is a separate and independent tract of ground. There is no continuous extension of improvement from Lansdale to Pennbrook. Farm land forms a belt more than one-third of a mile in width between Lansdale and Pennbrook. The house in Pennbrook most remote from Lansdale is one mile distant from the borough line going by streets. The few houses on the large tract are so scattered that they have no appearance of a settlement. They are located within a square whose sides are 2,000 feet long.

13. The Shale Brick plant is still more distant from Lansdale. It is located near the intersection of the railway and Church Road. It is 2,700 feet from the factory to the nearest boundary line of the borough. By the existing streets the distance is 4,000 feet. There is the same intervening unimproved ground between this plant and Lansdale that is found in the Pennbrook location, except that there is more of it both on the north and on the south side of the railroad. There is an outgrowth of buildings beyond the southeastern borough limits.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

14. In 1919 J. Albert Miller, the manager of Pennbrook Park, applied to the plaintiff company for electric service. Three propositions were made to Mr. Miller. First, plaintiff was to build the line from its terminus, to Pennbrook, at the expense of the latter, repayment for the outlay by the plaintiff to be made at a certain rate for each consumer that was added to the service. Secondly, the plaintiff was to build the line upon a guaranty by Pennbrook of a certain amount of business. Lastly, to connect up with the Lansdale existing line, and plaintiff would obtain the current from Lansdale, if this could be accomplished. It seems that the plaintiff did not succeed in bringing about such arrangement with Lansdale.

Mr. Miller would not agree to either the first or second proposition. He then went to Lansdale, and, as already stated, the said borough made its first connection with the pumping station in Pennbrook in 1920. The propositions one and two made to Pennbrook were the same in kind that the Public Service Commission had approved.

During and at the close of this war public utility companies were laboring under great difficulties, both as to materials and funds.

14. Mr. H. L. Irwin, the manager of Mr. Vaughn's shale brick factory, opened negotiations with Mr. Dutton, the representative of the plaintiff company. This was in 1918 or early in 1919. Conferences were had in February, March and April, 1921. Mr. Irwin needed two motors to run the brick plant by electric power, and Mr. Dutton was requested to obtain propositions from several manufacturers. The best he could do was an offer to furnish the two motors for about \$1200. The plaintiff offered to extend its line at once to the Shale Products Company if the latter loaned to the plaintiff \$2500 or purchased its bonds to the amount of \$2000.

The extension of the plaintiff's line along Church Street, however, was not dependent upon Mr. Irwin's acceptance of this proposition. The corporation had already resolved to extend its line along Church Road to connect with its Chalfont purchased line. The financial aid was solicited in order to give the brick company immediate connection and power service.

Mr. Dutton understood that his proposition was accepted by Mr. Irwin. There was, however, no written contract or binding agreement on the part of the brick company. Mr. Dutton, in good faith, on March 12, 1921, purchased the transformers needed by the plaintiff company to make the connection at the brick plant. Their cost was \$900. He also purchased the necessary wire at a cost of \$800.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

He obtained permission from the brick company to place fifty poles on its railroad siding and purchased the poles. The work of construction on the ground was in fact commenced on May 12, 1921. The cost of building the line to the brick plant, including the transformers, was at least \$4500.

15. Mr. Irwin admits that under the plaintiff's proposition the brick company was to buy its own motors and purchase bonds of the plaintiff company in the amount of \$2000, or finance the undertaking in that sum. We repeat, the construction was not dependent upon an acceptance of the proposition, as the action of the plaintiff discloses.

Mr. Irwin applied to Lansdale Borough after he had received the foregoing terms from the plaintiff.

On May 2, 1921, the Borough Council referred the matter to its solicitor and the Electric Light Committee. A contract with Mr. Vaughn, the proprietor of the brick company, was prepared. It was not before the Borough Council until May 16th, 1921, and the Borough Council then "decided unanimously to go ahead with the extension." "Extension" meant the continuation of the borough's line on Church Road to the brick plant, a distance of 1000 feet.

Mr. Miller, representing Pennbrook Park, was present at this meeting of the Borough Council and offered the aid of his attorneys to protect and secure the borough's rights in such extension, and to pay one-half of the costs of any legal suit should the borough lose.

16. The contract of the borough with Mr. Vaughn is an installment bailment lease, for two motors. The bailment is to continue for six months. The bailee was required to pay \$500 upon the signing of the lease and a further installment of \$500 at the expiration of each two months of the lease. At the end of the term the bailee could buy the motors by the payment of the additional sum of \$500. The purchase price was therefore \$2500. In truth, the sum \$2500 named in the lease includes the cost of the motors, \$1300, and the cost of continuing the line for 1000 feet. So that the brick company obligated itself to pay the entire cost of extending the line, the motors and the installation of the connections. Why the \$1200, the cost of line construction, was concealed and included in the cost of the motors was not fully explained. This lease was not signed by the borough officials until the case was on trial before the Court.

Mr. Irwin desired to withdraw the agreement at the meeting of council on May 16, 1921; that is, on the night it was first produced. Evidently he had some doubt as to the right of the borough to serve

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

the brick plant with electric power, under the transactions already recited.

The borough would not consent to such withdrawal. Mr. Irwin, after the promised aid of Pennbrook Park, was satisfied to let the agreement stand.

17. The terms offered by the plaintiff to make the connection with the brick plant, even if they had been exacted, were more favorable to the brick plant than the bailment lease, except that the plant was not required to raise as much immediate cash.

The plaintiff's offer was more favorable because it assumed the actual payment of the line construction and the installation of the transformers. Lansdale secured the contract because it bought, supplied and leased the machinery to operate the plant at an initial cost to the brick company of only \$500.

It also appears that the tariff rate for power current filed by the plaintiff with the Public Service Commission is below the rate scheduled by Lansdale Borough.

18. The plaintiff, on the morning of May 12, 1921, began work on the ground on Church Road, to build a connecting line to the brick plant. Whatever misunderstanding there may have been, plaintiff, in good faith, started the construction and completed the line on Church Road, connecting it with its existing line at the intersection of the public road and the railroad. The line was fully completed along the brick plant before this bill was filed and before the borough actually supplied any power to the brick factory.

19. The superintendent of the borough electric plant did not come in contact with Mr. Irwin, the manager of the brick factory, until April, 1921. The contract with Mr. Vaughn did not appear before the Borough Council until May 16, 1921, and the resolution of Council to go on with brick plant extension was not passed until that date. Still, on May 12, 1921, about 9.30 A. M., Mr. Dirks, the borough's electric superintendent, sent his workmen to commence the construction of a line 1000 feet long on Church Road to connect with the brick plant. This was four days before the Borough Council saw the agreement and four days before it decided to build the line.

The plaintiff's workmen, prior to this hour, dug some holes on Church Road to plant poles then on the ground near the railroad crossing at the brick plant. Mr. Dirks, under advice received from Mr. Miller, of Pennbrook, ordered his men to string wires along trees, and on an arm attached to a pole of the Bell Telephone Com-

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

pany. By this method of procedure Lansdale was first in making the connection, although the wire used was so light that it was insufficient to carry power current, and had to be replaced later by heavier wire.

20. This race for position was suspended by an agreement to hold a parley in the office of the plaintiff's counsel.

The consultation was suspended to enable the solicitor for the borough to ascertain what the latter intended to do. Without further notice to the plaintiff, the borough went on with the work and made the connection by planting poles and using suitable wire. It began to supply the brick plant with power about June 1, 1921.

21. Under the sale of the Chalfont line the borough agreed to furnish the necessary current from its plant to enable the plaintiff company to operate that line. The plaintiff's construction at the time of this procedure, as already shown, terminated at Beaver Road. It had no existing line to furnish the current to Chalfont from its own plant.

22. The borough, in its construction of the Pennbrook line, and its connection with the brick plant, expended \$2481.40.

23. The borough never obtained the municipal consent of the township of Upper Gwynedd to supply electricity to the inhabitants of said township. One of the supervisors had a conversation with the superintendent Dirks and told him he could go ahead. The township authorities never preferred any objection to the borough concerning existing lines.

24. To engage in generating and furnishing electricity is a hazardous business. This results from the rule of law, "that anyone using such a dangerous agent is bound, not only to know of the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them."

Borough councilmen serve without pay and are usually employed in looking after their own business affairs, and cannot give the time and attention that is demanded in the supervision of such a dangerous enterprise. They are necessarily dependent upon employees to whom they can not give the required oversight. A single act of negligence, carelessness, inattention or ignorance of such employees may bring serious loss to the tax-payers of the borough. There is also the danger of financial loss in conducting any extensive commercial business.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

DISCUSSION.

The material facts in this case are not in serious dispute.

The borough of Lansdale is engaged in a commercial enterprise that involves a large investment of capital. It is taking steps to increase its business to still greater proportions. It is doing the business of a public service corporation, in a territory comprising more than forty square miles.

The anxiety to increase its business enterprise is well illustrated by the methods employed to connect its lines with the Vitrified Shale Products Company, and Pennbrook Park.

The plaintiff company, chartered to supply electricity to the inhabitants of Upper Gwynedd, was ready to discharge the duties assumed under its charter and merger. It offered to furnish the power current to the brick company. It started to construct its line to enable it to supply the electricity from its own plant. Whether it had a binding contract with Mr. Vaughn is not material. It believed it had. It commenced the work on the ground on May 12, 1921. It had purchased the supplies necessary to build the line and make the connections with the brick plant. The connection of the line, under the evidence, was not dependent upon the existence of a binding contract with Mr. Vaughn. The work was started in good faith to supply Mr. Vaughn's needs. The line was expeditiously constructed. The representative of the brick plant was not in touch with the superintendent of the Lansdale electric department until April, 1921. He had the proposition and terms of the plaintiff and urged it to make speedy preparations to supply the factory with power. He then approached the Lansdale representative to ascertain whether he could make a deal with the borough at a lower immediate cash expenditure. Mr. Dirks of the Lansdale plant made an extraordinary offer. The borough was to go into the market, and, at its expense, equip the brick plant, at a cost of \$1300, and build the line and purchase the transformers for the additional sum of \$1200. The small initial cash of \$500 demanded by the borough was the tempting bait.

The contract signed by Mr. Vaughn was not before the borough council until May 16, 1921. It does not appear that even at this time any specific action was taken by council to approve the installment lease, except that the borough on that night decided to go on with the extension.

Four days before this meeting of council, Mr. Dirks, the superintendent, had put his men to make, and actually made, the connection

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

on trees with the brick plant on May 12, 1921. When the borough decided to make the extension, Mr. Dirks, without any authority whatever from council, had already made the connection. Here was a race, but Lansdale had not as yet qualified to enter as a competitor. Mr. Irwin, for the brick plant, on the 16th day of May, with knowledge of all the facts, requested the return of the Vaughn agreement. The borough protested against any such withdrawal.

Chapter VI, Article XVII, Sect. 41 of the Borough Code of 1915, page 373, authorizes boroughs to supply electricity beyond their boundaries.

The Act, however, was careful to say "nothing in this section shall conflict with the corporate rights of any corporation empowered to supply electricity in territory adjacent to such boroughs or with the rights of any other borough."

If the action of the borough of Lansdale, under the foregoing facts and circumstances, does not conflict with the rights of the plaintiff corporation authorized to supply electricity in the adjacent township of Upper Gwynedd, then it is difficult to conceive what acts can constitute such conflict.

The 41st Section, in declaring that the borough shall not conflict with the corporate rights of any corporation in the same territory, implies that the corporation has at least the superior right in such territory although it may not enjoy the sole right.

But it is contended that equity has no jurisdiction to pass upon the merits of this controversy, that the remedy must be sought before the Public Service Commission.

The Public Service Commission Act of July 26, 1913, P.L., 1374, in Section 1, declares:—"The term corporation . . . shall not include municipal corporations except as otherwise provided in this Act."

There is no exception in any section of the Act that covers the contingency before us. There is no attempt to vest in the Public Service Commission any supervision over boroughs except in matters referred to in Article II and III, which do not affect our case.

The Public Service Commission itself decided that it had no jurisdiction over boroughs so far as they engage in serving electricity. The Commission can not help consumers of borough current in any controversy with the borough. They must apply to the Courts; Application of Towamencin Light, Heat & Power Co., 3 Corp. Rep., 366; Gilmore vs. United Gas Co., 9 Corp. Rep., 262.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

These rulings are approved in *Barnes Laundry Co. vs. Pittsburg*, 266 Pa., 24. The Court held that municipalities are not within the term "Public Service Companies" and are not subject at all to the jurisdiction of the Public Service Commission, except as to the limited extent referred to in the title and certain parts of the Act.

It is also contended that the borough of Lansdale is acting under corporate rights conferred by its charter and that this Court has no jurisdiction to determine whether the borough has exceeded its powers; that the Commonwealth alone must raise this question.

If we are correct in holding that the controversy before us is not within the jurisdiction of the Public Service Commission, then it follows that equity jurisdiction must be tested by the rulings of our Courts unaffected by the Act of 1913 creating the Commission. If the term "corporation" used in the Act of June 19, 1871, P. L. 1360, includes municipal corporations, as held in *Tyler Tube Co. vs. Borough of Washington*, 48 Pitts. L. J., 363, then equity is the remedy pointed out to determine whether Lansdale under its charter has the power it is exercising. The rights of the borough must be found in the Act of Assembly under which it is incorporated, especially the Borough Code of 1915. It is there we must search for the power.

It would certainly be a hardship upon the Commonwealth if she must start the proceedings in all cases where a borough is doing an act to the injury of an individual or corporation and alleges that the act was done under its chartered rights. The complainant who deems himself injured resorts, in such case, to the equity courts—*Corey vs. Edgewater Borough*, 18 Pa. Superior Ct., 228.

Boroughs may be enjoined from doing many things they have no right to do—*Trickett on Boroughs*, page 266.

Equity will restrain a borough from entering upon private lands without authority of law—*Hancock vs. Borough of Wyoming*, 148 Pa., 635; or from subscribing for shares of stock in a railroad company; *Sharpless vs. Philadelphia*, 21 Pa., 147.

In a suit between a borough and a railway company it is not necessary that the bill should be filed by the Attorney General—*Easton vs. Passenger Railway*, 2 County C. R., 639.

In furnishing a supply of water or electricity the municipality acts in the same capacity as a private corporation—*Central L. & S. Co. vs. Harrisburg*, 271 Pa., 340.

We are also convinced that the bailment contract made by the

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

borough with the brick plant was beyond the powers vested in the town council. We shall not repeat what we said upon this branch of the case in *Day vs. The Borough of Lansdale*, 35 Montg. L. R., at page 42, citing *Dillon on Municipal Corporations*, Vol. 3, Section 1292, and *Pasadena vs. Pasadena L. & W. Company*, 152 Cal., 579. Buying and selling factory equipment is foreign to the business of a borough.

We are therefore convinced that, in the equity proceeding before us, we have the power to restrain the borough of Lansdale from supplying electric light and power to the Lansdale Vitrified Shale Products Company, on the ground that it clearly appears from the facts that the line constructed and connections made by Lansdale with the brick plant conflicted with the corporate rights of the plaintiff, and because the existing contract made by Lansdale is illegal.

The testimony took a somewhat wider range than the prayer for relief. The evidence was directed, particularly, to the location of the brick plant and the controversy between the parties in supplying electric current and power to that plant.

True, the testimony covered the surroundings of Pennbrook and its relation to the borough of Lansdale. No specific allegation is made that the service and current now supplied in the Pennbrook development is an illegal exercise of power by Lansdale. There is no prayer that we should terminate such service. We do not see how we can interfere with the service now furnished by Lansdale to these consumers. They are not made parties to the bill. They have existing rights in the supply lines running to their homes, and the wiring placed in their buildings. We cannot destroy these rights without affording them a hearing. The same is true as to other customers receiving current in the said township from Lansdale. There is no prayer for a mandatory injunction.

Again, there is no specific allegation in the bill that the section in the Borough Code of 1915 upon which Lansdale relies for its authority to supply electricity beyond the borough limits is unconstitutional. The bill does allege that the borough is attempting to perform the functions of a public service corporation without obtaining a certificate of public convenience. It also declares that the borough operates in territory which is not adjacent to the corporate limits of Lansdale.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

The bill does specifically say that the brick plant is not in territory adjacent to the borough. But a borough has no right to serve electricity in adjacent territory where the furnishing thereof, as in this case, is in direct conflict with the corporate rights of the plaintiff in said territory.

The evidence as to the surroundings of any locality, other than the brick plant and Pennbrook Park, is quite meager.

As already stated, there is no prayer that we order the existing service in Pennbrook to terminate, and customers now served are not in Court.

We shall dispose of the Pennbrook Park service upon the ground that the borough cannot make connections for new customers because such service would be in direct conflict with the corporate rights of the plaintiff, even if Pennbrook Park is adjacent territory to Lansdale.

We still think there is doubt whether Section 41, Article XVII, Chapter 6, of the Borough Code of 1915, is constitutional so far as it authorizes boroughs to supply electricity outside their limits, at least if such granted authority is intended to allow service in territory beyond the immediate ground or continuous overflow of the borough limits. We refer to the reason given in the Day case. We are also of opinion that we should confine our conclusions to the limited scope just defined because the prayers of the bill do not ask specifically for any more extended relief.

We are asked "to restrain the construction of power and transmission lines in Upper Gwynedd Township." This must, of course, apply to future constructions. What future lines the borough intends to build we are not informed.

We are also asked to restrain the borough "from transmitting, delivering and furnishing electricity to such portions of the township wherein complainant has extended, and is extending, its equipment to serve the inhabitants thereof."

What lines the plaintiff "is extending" beyond those noted on the draft does not appear. How far service from any borough line conflicts with the service from the plaintiff's existing lines is not made clear, except that the borough's line on Church Road at Pennbrook Park creates such conflict. Of course there was such conflict at the brick plant as already shown.

We shall assume that Pennbrook Park is on adjacent territory to Lansdale. Our finding of facts, when applied to the word "adjacent," might sustain a different conclusion.

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

We refer to our opinion in the Day case, where we considered the meaning of the term "adjacent." We also refer to *Easton Power Company vs. Richards*, 14 North. C. R., 292, and *Pennsylvania Utilities Co. vs. Lehigh Navigation Co.*, 4 Corp. Rept., 261. It is there said that "adjacent thereto" is the territory geographically close, but which no company has been chartered to serve, or which, if chartered, it cannot serve for physical or economic reasons.

We prefer to base our conclusion on the finding that service to new customers in Pennbrook Park, under all the evidence, would conflict with the corporate rights of the plaintiff company. This seems to be the principal ground upon which the complaint in the bill is founded.

When the negotiations between the representative of Pennbrook and the plaintiff corporation began, Lansdale was not prepared to serve the residents of Pennbrook.

Lansdale knew that such negotiations were pending, because the plaintiff corporation applied to Lansdale for current from its plant to serve Pennbrook.

That the plaintiff corporation intended to supply Pennbrook was also apparent when it took the Chalfont line from the hands of Lansdale. The decree of the Court made this line useless to Lansdale. The contract provided that Lansdale should furnish the current until the plaintiff could bring up its own lines to connect with the Chalfont purchase. The plaintiff had started to build toward Church Road, and naturally its lines would run up that road to make the desired connection with the Chalfont line.

The plaintiff corporation had also authorized the extension of its existing line along Church Road as early as March 31, 1920. Lansdale had full knowledge of the plaintiff's preparations to build along Pennbrook. It had this knowledge before it built its first connection at the pumping station in Pennbrook. It made its extension along Church Road after the Day decree became a final judgment. We suggested several reasons why the borough should not extend its lines at these distant points from the Lansdale boundaries. But the borough, after that decision, launched out in every direction to enlarge its commercial enterprise. Our suggestions and reasons may not have been well founded, and the borough council, if of that opinion, would naturally disregard them.

With full knowledge of the plaintiff's actual preparations to serve Pennbrook within a reasonably short time, the borough, just

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

as in the brick plant controversy, entered into a race to outdistance the plaintiff corporation.

While the plaintiff corporation "may not enjoy the exclusive right to serve the residents of Upper Gwynedd, it should, under the law, have the superior right where it is ready and willing to supply the current.

In Towamencin Light, Heat & Power Co., 3 Corp. Rep. 366, the Public Service Commission has well said: that auxiliary service from a municipal plant cannot be compared with the service of a corporation that is subject to strict supervision as to rates, service and facilities. The consumer supplied by the borough has no protection or redress, except through the ordinary channels of the Courts.

The plaintiff, when this bill was filed, was ready to make connections with any consumer in Pennbrook who desired a supply of current. The borough should not extend its service and supply in Pennbrook to any owner or resident therein unless the plaintiff refuses to render the service.

It is argued that such order will injure the borough because it has gone to the expense of running its lines to Pennbrook. We answer, it went into the field knowing that it was entering into a conflict with the corporate rights of the plaintiff. If the buildings that asked for the service, and received it, were not sufficient to justify the investment, the borough should have kept out. Its entrance into the contested district was a voluntary act.

It is against the policy of the law that a borough council should jeopardize the taxpayers' money in commercial enterprises. The danger is now more apparent than in 1918, for it appears that town council is increasing its plant and adding obligations of the taxpayers aggregating \$65,000. It is contended that this is a matter for the borough council, and no concern of the Court. Our attention has not been called to any borough engaged in such an ambitious enterprise.

Just what proportion of the electricity generated by the borough is used within the corporate limits is not clearly stated. The numerous lines in the four townships, and the manufacturing plants supplied with power outside the borough, must consume a large proportion of the current power developed. The addition of 1000 kilowatts shows that the borough is not engaged in selling surplus current, but generating a supply to increase its commercial business.

In Overall vs. City of Madisonville, Kentucky, 102 Southwestern

The Philadelphia Suburban Co. vs. Boro. of Lansdale, et al.

Rep. 278, the Court said: "In no instance of which we are aware has it been held by any Court, or allowed by any Act of the legislature, that a municipality could go into a commercial business purely as an enterprise of gain."

CONCLUSIONS OF LAW.

1. Equity has jurisdiction to consider the allegations in the bill, and to grant the remedies that are demanded under the evidence.

2. The plaintiff is entitled to an order against the borough of Lansdale restraining it from supplying electric current and power to W. Frank Vaughn, trading as the Lansdale Vitrified Shale Products Company, at its plant located at or near the intersection of the Reading Railway and Church Road. This order to become effective thirty days after a final decree and judgment are entered.

3. The contract fully described and spread upon the record between the borough of Lansdale and the said W. Frank Vaughn, trading as the Lansdale Vitrified Shale Products Company, called a bailment lease, is declared illegal, and the defendants are restrained from further operating thereunder.

4. The borough of Lansdale is also restrained from supplying electric current or power to any resident or property owner within the limits of Pennbrook Park fully described and outlined on the draft in evidence, except such consumers it was serving before this bill was filed by plaintiff.

5. That the defendants pay the costs of this proceeding.

AND NOW, January 24th, 1922, the foregoing findings and conclusions of law are filed in the office of the prothonotary, who will notify the parties or their counsel of such filing, and he will enter a decree *nisi* in accordance with our second, third, fourth and fifth conclusions of law, and if no exceptions are filed as provided by the equity rules, he will enter a final decree accordingly as of course.

In the Court of Common Pleas of Montgomery County**Holland vs. Smith**

Plaintiff, while walking on the highway, was struck, from the rear, by defendant's automobile and sustained personal injury. Suit was brought for recovery of damages and a verdict was rendered in favor of the defendant, whereupon, plaintiff made a motion for a new trial. The testimony showed that the plaintiff heard the signal of the defendant's automobile from his rear and that he had "peace of mind" and did not move from his position on the side of the asphalt portion of the roadway. It must, therefore, have been found by the jury that the plaintiff was guilty of contributory negligence, and the jury evidently found that he failed to exercise ordinary care, whereas, a step to the side might have avoided the accident, and as this is a matter for the jury to determine upon the facts the verdict must stand, and a new trial be denied.

No. 153, November Term, 1920.

Motion for a new trial.

Harold G. Knight, Attorney for Plaintiff.

G. Herbert Jenkins, Attorney for Defendant.

Opinion by Miller, J., January 3, 1922.

The plaintiff, a pedestrian on a public, country highway, was run into from the rear by defendant's automobile, which he claims was being negligently operated, and sustained personal injuries. He brought this suit for the recovery of his damages and the verdict was for the defendant. He asks for a new trial, because, as he contends, the verdict was against the law, the evidence, and the weight of the evidence, and for such other reasons as might be disclosed by the testimony. The trial notes have not been transcribed and in disposing of the motion we are, therefore, compelled to rely on our own, which happen to be rather comprehensive, and to set forth the facts in greater detail than is usually required.

The highway on which the accident occurred was originally a turnpike, but is now an improved county road. At the site of the accident it extends generally northerly and southerly in a straight direction, is practically level, has along its middle a smooth, asphalt surfaced bed about fifteen feet and six inches wide, on either side of which there is a berm of crushed stone, substantially level with the center and about six feet wide, and it has no sidewalks. On its west-erly side there is a public garage some twenty-five feet in front the nearer edge of the asphalt with the space in front of it open for use by vehicles and a gasoline pump in this space and about twelve feet from the asphalt. A little to the north of the garage and on the oppo-site side of the road is an ordinary farm lane, or entrance.

Holland vs. Smith.

On the afternoon of July 28, 1920, which was clear, the plaintiff was walking in a northerly direction on his extreme right-hand side or edge of the asphalt road bed. As he approached the garage he heard the defendant's car overtaking him from the rear. He heard its horn blown "at least once," but did not turn to look at all, because, as he expressed it, he had "peace of mind." As he walked along he had observed an automobile, headed north, standing at the gasoline station in front of the garage, and as he neared it he saw it start to back out into the road diagonally, preparatory to its going north. As it came to a stop before starting forward with at least its right side on the asphalt not over ten feet away from the plaintiff, who, at the time was directly opposite its rear wheels, he was struck from the rear by the right front of defendant's car and pushed for some distance into and across the farm lane, without, however, losing his upright position. No other vehicles were near at the time.

On behalf of the defendants it was testified that when their horn was first blown, the plaintiff turned so that they could see his full face and looked at them defiantly, and then continued in his course and "acted as though he would not take a step to get out of the way."

Defendant's Ford sedan was, at the time, occupied by himself and his wife, and she was driving. She was inexperienced and the car was new, stiff, needed adjustment, and its brakes did not hold. It was moving very slowly, and if the brakes had been in order when they were applied it would have stopped before reaching the plaintiff. Mrs. Smith tried to stop soon as she saw that plaintiff was holding to his course on the asphalt and the standing car was backing out into the road ahead of her, but was unable to do so because of the brakes before the car reached him. She had turned slightly to her right to avoid a collision with the other car, and testified that there was not enough space for her to pass in safety between it and Mr. Holland. She had first observed him when he was 70 or 80 feet ahead of her.

The negligence of the defendant was, of course, for the jury. The verdict does not indicate how they found on the question, but we shall assume that, as would have been eminently proper under the testimony, they did find that this element in the case had been established. Counsel for the plaintiff, therefore, in our opinion, sets forth correctly the only question now before us when in his written brief he says:

"The plaintiff was struck from the rear in broad daylight. The only possible explanation of the verdict is that the jury found the

Holland vs. Smith.

plaintiff guilty of contributory negligence. If there was no duty on the part of the plaintiff to do more than he did, and it is submitted there was not, then as a matter of law he was not guilty of contributory negligence, and the verdict was against both the law and the evidence."

It is on this theory that we shall dispose of the motion, which involves no difficulty if we keep in mind the distinction between an abstract legal right and its exercise under a given set of circumstances.

Petrie v. E. A. Myers Co., appel., 269 Pa. 134, on which plaintiff so strongly relies, is but the last authoritative application to its own facts of the principles of law that one walking longitudinally on his extreme right-hand edge of the paved bed of a country road, which has no sidewalks, is not required to be most vigilant and is not to be held to a high degree of care; that, as a general proposition, he may safely assume, as his rights are equal with those of the users of motor or horse-drawn vehicles, that he will not be struck from the rear by any such vehicles; and that, because warning of its approach was given, he was not necessarily guilty of contributory negligence—especially as he may not have heard it. Two of the controlling facts in this case were, however, that the pedestrian was killed in the accident and it was not shown that he either knew, or had been made aware, of any warning of the approach from his rear of the truck that ran him down. It does not, nor was it intended to, relieve the pedestrian of the duty of exercising ordinary care in the circumstances in which he may find himself placed. Also see *King et al., app., v. Brillhart*, 271 Pa. 301. Such a pedestrian is lawfully on the highway, his right to its use is equal with those of other users of it, but the exercise of his right must be attended by a due regard for the safety, as well of himself as of such other users, and one of the circumstances in the light of which his conduct will be judged, surely in the ordinary case, is his greater facility, because of his alertness, in escaping danger. Such factors as momentum and distance within which stoppage can be accomplished, or direction changed, do not enter into the equation.

Our facts are radically different from those in the Petrie case. Here, due warning of the approach of the defendant's car was given—at least once, as the plaintiff says; twice, as is testified by the defendant and his wife—and the plaintiff knew that it was coming, because he heard it, as well as the warning, but, as he testifies: "I did not turn to look at all," while the defendant and his wife both

Holland vs. Smith.

say he turned and looked back so completely that they saw his full face. Whether he turned to look or did not do so is of no consequence, however. The important fact is that he knew well before the accident that the car was overtaking him from the rear. He kept straight on and never again looked back. As he walked he saw the car ahead, saw it start to back out into the road and neither he, nor the occupants of the defendant's car, had any means of knowing how far, or where, it was going. He knew that the distance between it and the line on which he was walking was being thus narrowed all the time. The situation created by this backing car is the feature which really distinguishes this case from the ordinary one. He, of course, heard the defendant's car keep on coming. In this combination of circumstances, so fraught with danger to himself, what did he do? Absolutely nothing, except to hold tenaciously to his abstract right and to keep straight ahead without departing from his course by so much as a hair's breadth. It was his duty at least to have taken care of himself; to have used ordinary care; it cannot be said, as a matter of law, that he was free from negligence; this question, under the testimony, was for the jury; and, in our opinion, their verdict was against neither the law, the evidence, or the weight of the latter. In fact, it finds abundant support in the testimony.

While the plaintiff was not required to anticipate and guard against the negligence of the defendant, he did have the positive duty to anticipate what was reasonably probable, under all the circumstances. The jury evidently found that he failed in its performance—that he failed to exercise ordinary care. It may be that a single step to the right would have saved him from injury, but he would not take it.

AND NOW, 3 January, 1922, the motion for a new trial is overruled, the reasons are dismissed, a new trial is refused and the prothonotary is ordered to enter judgment in favor of the defendant and against the plaintiff on the verdict upon payment of the verdict fee.

In the Court of Common Pleas of Montgomery County**Hansen vs. Van Lennep**

Plaintiff brought suit against defendant as a holder for value, by assignment of a promissory note for Fifteen Hundred Dollars. The defendant alleges, first, that the plaintiff was not a holder for value without notice; second, that the amount of the note was not due under the agreement between the original payee and the defendant the maker. The defendant alleges that it was because of certain inducement and promises the purchase was made and the note signed, therefore, the rule for judgment for want of sufficient affidavit of defense must be discharged.

No. 111, September Term, 1921.

Rule for judgment for want of a sufficient affidavit of defense.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Miller, J., March 30, 1922.

The plaintiff, an endorsee, claims to be the holder for value, before maturity and without notice of infirmity, of a past due negotiable promissory note made by the defendant to Henry A. Rowan, Jr., Company for \$1500, and sues for recovery. The defendant sets up two grounds of defense.

The first is to the effect that plaintiff is not such a holder and, as to it, it is conceded by his counsel that the affidavit is sufficient to prevent summary judgment.

That the second may be understood, it is necessary to make a brief statement of the relevant facts now properly before us.

In June, 1921, Henry A. Rowan, Jr., Company, of Philadelphia, of which corporation Henry A. Rowan, Jr., was the president, was the distributor for eastern Pennsylvania, southern New Jersey, Delaware and eastern Maryland of Haynes Motor Cars, which were manufactured by Haynes Automobile Company, of Kokomo, Indiana, and the defendant, who resides in this county, was the owner of a Haynes automobile of the sedan type. Mrs. Van Lennep, early in that month, entered into negotiations with Mr. Rowan, acting for his company, for an exchange of her used car for a new one of the same manufacture and model or design. The negotiations were successful, the exchange was made on the basis of a valuation of the new car at \$4500 and the used one at \$2000, and the defendant gave her promissory note to the Rowan Company at three months for the balance of \$2500. At its maturity, \$1000 was paid by her on account and the note was renewed for \$1500. The renewal note is the one in suit and for the purposes of this rule it must, in the hands of the plaintiff, be

Hansen vs. Van Lennep.

regarded as subject to the same defenses as would be available against the payee. After the rule for judgment was taken and before it was argued the defendant filed a supplemental affidavit of defense. The plaintiff still presses for judgment.

The defendant denies liability for the amount claimed to be due because, as a part of the agreement aforesaid and as an inducement therefor and but for which the exchange of cars would not have been made by her, the said Henry A. Rowan, Jr., acting for the said Henry A. Rowan, Jr., Company, and the Haynes Automobile Company, not only made and delivered to her a written agreement guaranteeing her against any reduction in the price of Haynes cars until after January 1, 1922, but that, acting for the Rowan Company alone, he had, at the same time, furthermore verbally promised and agreed with her and guaranteed her against reduction of Haynes cars by the Haynes Automobile Company for a period expiring with January 1, 1922. She avers, further, that in August, 1921, the Haynes Automobile Company had reduced its sedan model, similar to the one that she had bought, to the extent of \$1500 in price, at which lower price it had been thereafter on sale in the Philadelphia market; and that, by reason of such reduction in price, she had been damaged to the extent of \$1500.

This does not appear to be a case in which, as is suggested by counsel for plaintiff, it is sought to vary or set aside the terms of a written instrument because of fraud which had induced its execution. The defendant affirms her undertaking, seeks to escape from none of its terms and asks only that the plaintiff also be held to it. She does not deny her indebtedness, had there been no reduction in price. The defense set up discloses the ordinary case of the sale of a patented chattel of identified type at a price certain, accompanied by the undertaking of the vendor to protect the purchaser against any decline in such price within a definite time. If such a decline takes place within the specified time, the effect is a partial failure of the consideration moving to the buyer as distinguished from the loss which usually follows breach of contract and is to be compensated in damages. Where, as here, an obligation has been given to secure part of the purchase money and it remains unpaid, such a reduction, therefore, affects correspondingly the consideration of the obligation.

The undertaking by Mr. Rowan for the Henry A. Rowan, Jr., Company, as set up in the supplemental affidavit, which must, at this time, be accepted as verity, falls, it seems, within the definition of an express warranty to be found in the Sales Act of 1915 as "Any

Hansen vs. Van Lennep.

promise by the seller relating to the goods * * * if the natural tendency of such * * * promise is to induce the buyer to purchase" them, and for a breach thereof by the company the defendant could keep the automobile and set up against the former its breach of warranty by way of recoupment in diminution or extinction of the price.

It is, however, not necessary to hold Mr. Rowan's asserted agreement as technically an express warranty. There is, of course, some measure of doubt on the subject, because his promise did not strictly relate to the automobile, as distinguished from its price. A buyer may always recoup his damages for the breach of collateral contracts on the part of the seller contained in the contract of sale. *Andre v. Morrow*, 65 Miss. 315; 3 Southern 659; Note, L. R. A., 1916 C 447 et seq.; and it is the general rule that the damages for fraud, or breach of warranty, or other collateral agreement on the part of the seller may be set up in recoupment though the action is brought on a note given for the price and not on the special contract of sale. 24 R. C. L. 107; *Eckel v. Murphy*, 15 Pa. 488; *Price v. Lewis*, 17 Pa. 51; *Falconer v. Smith*, 18 Pa. 130. In such case the defense is not strictly set off; it is rather an equitable one pro tanto. If sustained by the proof, it affects the consideration of the note, and is competent to defeat it; for if its consideration fail in whole or in part, the plaintiff's right to recover must also fail pro tanto. *Wilson's Appeal*, 109 Pa. 606. This defense directly attacks the plaintiff's right to recover: *Cornelius v. Bank*, 15 Pa. Sup. Ct. 82. In our opinion it also is set forth with particularity sufficient to prevent summary judgment.

AND NOW, 30th March, 1922, the rule is discharged.

In the Court of Common Pleas of Montgomery County.**Transportation Finance Company vs. Montgomery Bus Co.,
Inc., et al.**

The plaintiff, who obtained a bill of sale from B., executed a conditional sales contract with B. The defendant claims possession of the motor buses in question in that G. made the trucks for B. and the said trucks were assigned to G. with draft with bill of lading attached, which were paid through C., the intervenor in this case. The plaintiff asked for rule for judgment for want of sufficient affidavit of defense, but according to the facts if the defendant or C., the intervenor, have title, it is sufficient to defeat the plaintiff's right of possession, therefore, the rule for judgment must be discharged.

No. 138, April Term, 1921.

No. 138, April Term, 1921.

Rules for judgment for want of sufficient affidavit of defense.

G. Herbert Jenkins, Attorney for Plaintiff.

Maxwell Strawbridge, Attorney for Defendant.

Opinion by Swartz, P. J., Jan. 13, 1921.

The controversy arises over the right of possession in two motor bus chasses, valued at \$3396. The pleadings show that the plaintiff claims title under bills of sale from the B. & B. Motor Sales Company, dated March 7, 1921.

The defendants aver, in their affidavits, that The Gary Motor Truck Company manufactured the said chasses or automobiles in Gary, Indiana. They were ordered by the said B. & B. Motor Sales Co., and on March 17, 1921, the Gary Company shipped them to Newark, N. J., consigned to itself. The machines arrived on March 26, 1921. The invoice was accompanied with a sight draft, and bill of lading attached. The draft was on the First National Bank of Belleville, N. J., dated March 17, 1921, the day the automobiles were shipped from Gary, Indiana.

The Metropolitan Company, through its subsidiary company, the Security Credit Corporation, paid the said draft, on March 21, 1921.

The Security Company placed the machines with the B. & B. Company and received storage receipts.

The contract of storage provided that the B. & B. Company held an option for thirty days, to buy the machines.

The affidavit alleges that the B. & B. Company exercised the option and with the approval of the Security Company leased the motor trucks to the Montgomery Bus Company of Bryn Mawr, Montgomery County, Pennsylvania, under bailment

Transportation Finance Company vs. Montgomery Bus Co., Inc., et al.

leases providing for a sale. The Security Company purchased the leases and obtained assignments for the same.

On the 7th day of March when the plaintiff, the Transportation Finance Company, obtained the bills of sale from the B. & B. Company, it sold the trucks under conditional sales contracts to the said B. & B. Company. These contracts were recorded on the said 7th day of March, in the Register's Office, for Essex County, N. J.

We do not see how we can enter summary judgments against the defendants under these complicated transactions. When the plaintiff purchased the trucks, on March 7, 1921, they were still in the State of Indiana. For aught we know, they may not have been manufactured at that date. It is certain that the Gary Company did not part with its title in the trucks until the sight draft, with bill of lading attached, was honored. The check of the Security Company that paid the sight draft bears date March 21, 1921. The B. & B. Company, so far as there is any fact disclosed by the pleadings, had no contract, agreement or papers showing that it had any interest in said trucks on March 7, 1921. How can a vendor give title to an article to which he has no title of any kind whatever?

True, the plaintiff had the conditional sale contracts recorded. This would protect its title against subsequent purchasers or creditors, but it could not enlarge its title. It protected whatever title the company had but could not protect something it did not have.

If the recording itself vested title in the Transportation Company what protection would there be to the purchaser of a negotiable bill of lading?

Whether the Metropolitan Company is invested with the property rights secured by the Security Company is not material.

If there is title in the Montgomery Bus Company and the Security Company, it is sufficient to defeat the plaintiff's right of possession; *Johnson vs. Groff*, 22 Pa. Superior Ct., 85.

A plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of the defendant's title; *Lake Shore Railway Co. vs. Ellsey*, 85 Pa., 283.

When the facts are more fully disclosed and the law appli-

Buck's Estate.

cable to them is considered, it may well be that the plaintiff can maintain his claim to the machines.

We can only say that we are not convinced that the plaintiff under the affidavits of defense is entitled to judgment.

AND NOW, January 13, 1921, the rules for judgment for want of sufficient affidavits of defense are discharged.

In the Orphans' Court of Montgomery County.

Estate of William J. Buck

B died, leaving a will in which he devised unto his sister, C, a life estate in certain real estate, and "at her death to the heirs of our brother's children." At B's death there were surviving two nephews and one niece, at C's death one of the nephews had died. The question was, Who would take under the interpretation of the word "heirs"? Under the will it is apparent that the testator did not use the word heirs in its strict legal sense, and that the parties entitled to a distributive share would be the heirs apparent at the death of C, that is, in this case the children of his brother's children, irrespective whether the parents were living or dead.

No. 41 February Term, 1922.

Adjudication.

Evans, High, Dettra & Swartz, Attorneys for Accountant.

Opinion by Solly, P. J., March 2, 1922.

William J. Buck, a resident of the County of Montgomery, died on the 13th day of February, 1901, having made his last will and testament in writing bearing date the 20th day of June, 1900, with codicil bearing date the 3rd day of July, 1900, duly probated the 24th day of April, 1901.

He left surviving neither wife nor issue. He was survived by his sister, Isabella Cottman, and by three children of his only deceased brother, James N. Buck, their names being Kate or Catharine McCaffery, William C. and George W. Buck.

In his will he disposed of part of his real estate in the following clause:

"Unto my only beloved sister Isabella, the wife of J. Frank Cottman, I give all my right, and title to the farm of nearly fifty-two acres situated at Hatboro, and duly deeded unto me and said sister by our parents, Jacob E. Buck and Catharine, his wife, as will appear on record at Norristown, for her full and free use forever, doing therewith as she will deem best for her future support and maintenance, and thence descend to the heirs of our brother's

Buck's Estate.

children in consequence of having been derived unto us from our aforesaid parents, whereof fully two-thirds thereof was paid by me."

He gave to his said niece, Kate or Catharine McCaffery, and his nephew, William Buck, each a legacy of \$500, and he gave to his other nephew, George W. Buck, a legacy of \$1,000. He speaks of the niece and the two nephews as being the sole surviving children of his only brother, James N. Buck, deceased.

After the death of testator's sister, Isabella Cottman, the interest of the decedent in the farm of about 52 acres referred to in the will was sold by Samuel H. High, as trustee appointed by this court under a decree authorizing the sale by virtue of the provisions of the Price Act. The trustee received for the interest of the decedent in said farm the sum of \$4,000. His account was filed the 5th day of January, 1922, showing a balance for distribution amounting to \$3,638.50.

Catharine McCaffery, the niece, and George W. Buck, the nephew, are living. The other nephew, William C. Buck, died March 20, 1917, leaving surviving his widow, Mary A. Buck, and issue three adult children, George E. Buck, Harold Buck and Arthur Buck.

George W. Buck has the following named children living: Lillian E. Zoeller, Florence L. Barrett, Isabella C. Yunker, Ethel H. Buck and James N. Buck. The last two are in their minority and the guardian of their estates is John R. Roberts. There was another son, George W. Buck, Jr., who died in the year 1921, intestate, unmarried and without issue. His four sisters and his brother are his next of kin.

There are three living children of Catharine McCaffery. They are of full age and their names are: Bessie Riale, Antoinette D. Condon and Charles G. McCaffery.

If the nephew, George W. Buck, and the niece, Catharine McCaffery, were dead, their children would be their heirs. The heirs of William C. Buck, the deceased nephew, are his three children. There can be no question but that the children of the deceased nephew, William C. Buck, are clearly entitled to distributive shares of the fund for distribution. But, the question arises whether the remaining portion of the fund for distribution is presently distributable to the children of the nephew, George W. Buck, and the children of the niece, Catharine McCaffery. Both the nephew and niece are

living. If both of them were dead their children would, of course, take as their heirs.

The testator's sister was given a life estate in the 52 acre farm, which interest at her death was to descend to the heirs of the children of their only brother. On first impression it would seem that the heirs of the niece and two nephews could not be ascertained until their respective deaths because of the maxim that *nemo est hoeris viventis*. The word "heirs" in its strict legal sense denotes the person upon whom the law casts the inheritance on the decease of the ancestor. Where, however, the ancestor is recognized by the will as living, and other indicators show that the term "heir" was not used in its strictest sense by the testator, it is held to mean the heirs apparent of the ancestor named. 2 Alexander's Commentaries on Wills, Sec. 850; Barber vs. Pittsburgh, etc., Rwy., 166 U. S. 83, 108; Heard vs. Horton, 1 Denio (N. Y.) 165; Williamson vs. Williamson, 57 Kentucky 263, 296. See also Goodright vs. White, 2 W. Bl., 1010; Darbison vs. Beaumont, 1 Peere-Williams, 299 (24 English Reports, 366).

In Heard vs. Horton it is said: "Where the will recognizes the ancestor as living and makes a devise to his heir, *eo nomine*, this shows that the term was not used in its strictest sense but as meaning the heir apparent of the ancestor named." In the same case it is said: "A general devise to the heirs of A, who is a living person, but not referred to as such, would be void; for while A lives no one can be his heir. But a devise to the heirs of A, who is stated in the will to be now living, would indicate with sufficient certainty the persons intended. The designation would plainly refer to such persons as were at the time heirs apparent to A—those who would be his heirs if he should then die." In Barber vs. Pittsburgh, etc., Rwy., the testator bequeathed to A certain real estate, but provided that in the event of A dying unmarried, or, if married, dying without offspring by her husband, then the lots were to be sold and the proceeds divided equally among the heirs of B. Certain other lots of land were devised to B in fee. At the date of the death of the testator B was alive, married, and had children. A, who survived the testator, died leaving surviving neither husband nor issue. One of the questions involved in the case was what estate A took. It was held that she took an estate tail under the devise to her. It was also held that the persons who took under the limitation over were the heirs of B. The case originally arose in the Court of Common Pleas of Allegheny County. It was carried

Buck's Estate.

to the Supreme Court, carried to the Circuit Court of the United States and finally to the United States Supreme Court. The Court held (page 108) that the power to sell the lots of land upon the expiration of the estate tail and to divide the proceeds among persons then ascertainable was not within the rule against perpetuities; that the persons who were to take under the limitation over were described as the heirs of B. The Court said: "Although, strictly speaking, no one is an heir of a living person, yet a devise to the 'heirs' of a person named (who is a living person, and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect." *Darbison vs. Beaumont* and *Heard vs. Horton* were cited with approval.

When the life estate of the sister of the testator terminated by her death the remainder estate immediately passed to the heirs apparent of the three children of the deceased brother of the testator. Reference is made by name to the children of the deceased brother; indeed, pecuniary legacies are given to each one. The testator surely did not use the word "heirs" in its strict legal sense. It is unlikely he intended the farm to be tied up until after the death of the children of his brother, at which time their heirs in the strict sense could only be ascertained. After carefully considering the will in the light of all the circumstances surrounding the testator at the time of its execution we are of opinion that the testator did not make use of the word "heirs" in its strict legal sense, but used it as meaning the heirs apparent of the three children of his deceased brother, that is, persons who would be their heirs were they dead when the devise over took effect.

The proper distribution of the fund is to the children of the two nephews and niece *per stirpes*. It is presumed that a testator, in the absence of language showing the contrary, intends equality of distribution. The intestate laws must control questions of distribution arising upon the settlements of estates of testators, as well as intestates, unless the testator has clearly provided a different mode in his will. *Hoch's Est.*, 154 Pa. 417. See also *Beck's Est.*, 225 Pa. 578; *Webb's Est.*, 250 Pa. 179; *Wootten's Est.*, 253 Pa. 136.

The balance in the hands of the accountant, after the payment

Gilmore's Estate.

of collateral inheritance tax due the Commonwealth, is awarded as follows: One-third in equal shares to George E. Buck, Harold Buck and Arthur Buck, children and heirs apparent of William C. Buck; one-third in equal shares to Lillian E. Zoeller, Florence L. Barrett, Isabella C. Yunker, Ethel H. Buck and James N. Buck, children and heirs apparent of George W. Buck; and one-third in equal shares to Bessie Riale, Antoinette D. Condon and Charles G. McCaffery, children and heirs apparent of Catharine McCaffery. The shares of Ethel H. and James N. Buck are awarded to their guardian, John R. Roberts.

In the Orphans' Court of Montgomery County.

Estate of John Gilmore, Deceased

Decedent died leaving a Will, in which he gave the executors authority to sell the homestead, invest the proceeds and pay the income therefrom unto his wife for life, and at her death he gave one share unto his son, John, and another share unto his daughter, Mary. The latter, however, was upon condition that Mary survive her mother. John died in the lifetime of the mother, and the remaining heirs contended that the will provided that the fund derived from the sale of the real estate should be distributed among the remaining heirs of John, that is, to the brothers and sisters of John.

In construing a Will the intention of the testator must govern, and in this case it is clear that the testator did not intend to limit the estate of John, as he did in the case of Mary, and that as there was a positive direction to sell the proceeds of the real estate became personal property in the hands of the executors, and that the intention of the testator was that John should have a vested interest, therefore, one half of the balance is awarded to Mary under the Will, and the other half of the personal representative to John.

No. 31, September Term, 1921.

Adjudication.

L. W. Melcher and W. A. Melcher, Attorneys for accountant and certain legatees.

Larzelere, Wright & Larzelere, Attorneys for administrator of John O. Gilmore, deceased.

Opinion by Solly, P. J., November 7, 1921.

John Gilmore, a resident of the Township of Lower Merion, died on the 19th day of July, 1914, having made his last will and testament in writing, bearing date the 9th day of December, 1911, duly probated the 23rd day of July, 1914, on which letters testamentary were granted to John O. Gilmore and Matthew M. Gilmore, who were appointed executors. The former has since died.

The testator was survived by his wife, Jane O. Gilmore, and issue, the following named adult children: Matthew M. Gilmore, Hartman K. Gilmore, John O. Gilmore and Mary J. Montgomery. The surviving widow elected to take under the will.

Gilmore's Estate.

John O. Gilmore, one of the sons and executors, died March 11, 1919, intestate, and letters of administration on his estate were granted to Nicholas H. Larzelere, John A. Gilmore and W. E. Garrett Gilmore.

The surviving widow died January 31, 1921, leaving a last will and testament in writing which has been duly admitted to probate and on which letters testamentary have been granted to Hartman K. Gilmore and Matthew M. Gilmore, who were appointed executors.

The other children above named are living.

The testator in his will bequeathed to his wife the contents of his dwelling house at Merion; bequeathed to his sons Matthew M. and Hartman K. Gilmore, in equal shares, his liquor business, which they were conducting at 826-828 Walnut Street, Philadelphia, and his stock, interest and holdings in the Renault Wine Company; bequeathed to his son John O. Gilmore all stock of the Colonial Trust Company of Philadelphia.

The executors were directed to lease the Walnut Street properties to the sons Matthew and Hartman at the rental of \$3,000 per annum, and the income received from said properties he ordered the executors to pay to the widow during her life. Said real estate is devised to the said two sons upon the decease of the widow.

The testator directed his executors to sell his real estate at Merion, invest the proceeds, and pay over the net income from the investments when and as received to the widow during her lifetime. Upon her decease he directed the executors to divide all the investments of the proceeds of the sale of said Merion real estate into two equal parts or shares, one of which he bequeathed to his son John O. Gilmore absolutely, and the other one he bequeathed to his daughter Mary J. Montgomery, but provided that in the event of her dying without issue before the decease of his wife, then he gave and bequeathed the share to his sons, John, Hartman and Matthew, or the survivor or survivors of them living at the time of the decease of the widow, share and share alike.

The rest, residue and remainder of his estate, including any balance to the credit of his account in the Colonial Trust Company, after the payment of his debts and funeral expenses, he bequeathed to his wife absolutely.

At the time of his death the testator was possessed of personal estate, including his liquor business, and owned the real estate on Walnut Street, Philadelphia, and his dwelling house at Merion.

The account was filed the 21st day of July, 1921. It is divided

Gilmore's Estate.

into two parts. One part is the account of both executors to March 11, 1919, the date of the death of John O. Gilmore, one of the executors. It is stated by the surviving executor. The personal estate and the rents of the Walnut Street properties are accounted for. This part of the account contains a distribution statement, which shows that all the personal estate and the income therefrom was paid and distributed to the several legatees.

The other part of the account is that of the surviving executor, and embraces the period from March 11, 1919, to the date of the filing. The rents of the Walnut Street property are accounted for, and there is no balance for distribution. The Merion property was occupied by the widow up to the time of her death. It was sold by the surviving executor on March 23, 1921, for \$66,000. He accounts for the purchase money, and shows a balance for distribution of \$58,340.04.

Exceptions were filed to the amount of the credits taken for the commissions of the accountant, \$1,980, and counsel fee, \$2,500. After a full hearing it was agreed by and between the accountant and the exceptants that the credit taken for commissions should be stricken out, and \$750 allowed; and that the credit for counsel fees should also be stricken from the account and \$750 allowed. Any other claim for professional services of counsel as concerns the personal estate and real estate other than the Merion property it was agreed should be adjusted between counsel and the parties who have received the personal estate and the real estate. Under this agreement all the exceptions were withdrawn.

The accountant submitted to be surcharged with accrued interest on bank deposits received since filing the account \$759.63. Under the agreement the accountant is surcharged as to commissions \$1,230, and as to counsel fee \$1,750. The ascertained balance for distribution is \$62,079.67.

The executors of the will of Jane Gilmore, deceased, the widow and residuary legatee under the will of the decedent, claimed that one-half of the fund for distribution should be awarded to them because the bequest or gift of the same to the son, John, was contingent upon his surviving his mother, and there was no bequest over in case he did not survive her. It is conceded that the fund is personalty, because an equitable conversion of the Merion property resulted from the positive direction of testator's will that it should be sold by the executors, the proceeds invested, and distributed upon the decease of the widow.

Gilmore's Estate.

We do not see how the claim can be sustained either under the language of the will, or the well established principles of the law. A careful analysis of the will convinces us that the testator intended one-half of the proceeds of the sale of the Merion property to vest at his death in his son, John. He first gave the contents of his dwelling house to his wife, absolutely; next he bequeathed his liquor business (which was being conducted by them), consisting of stock, fixtures, books and accounts, and his stock, interest and holdings in the Renault Wine Company, to his two sons, Matthew and Hartman, absolutely, and ordered and directed his executors to lease the two properties, Nos. 826-828 Walnut Street, Philadelphia, in which his liquor business was conducted, at a stipulated rental, the net amount of which he directed the executors in the eighth clause of the will to pay to his wife during her life, and which real estate he devised in the sixth clause of the will to said two sons in fee, clear of incumbrances, upon the death of his wife; next he bequeathed to his son John his stock in the Colonial Trust Company of Philadelphia. Then, in the seventh clause, he ordered and directed the executors as soon as convenient in their good judgment to sell his real estate at Merion, invest the proceeds, and pay over the income to his wife during her life. The ninth clause, which disposes of the proceeds of the sale of the Merion property—the investments in which the proceeds were to have been made—reads as follows: "Upon the decease of my wife I order and direct my executors to divide all the investments made from the proceeds of the sale of my Merion real estate, the income from which has been paid to my wife, into two equal parts or shares. And I give, devise and bequeath one of these shares or parts of such investments unto my son, John O. Gilmore, absolutely. And I give, devise and bequeath the other of said shares or parts of such investments unto my daughter, Mary J. Montgomery, absolutely. In the event, however, of my daughter, Mary J. Montgomery, dying without issue before the decease of my wife, her mother, then the part or share of such investments to which she would have been entitled, I give and bequeath unto her brothers, my sons, John O. Gilmore, Hartman K. Gilmore and Matthew M. Gilmore, or the survivors or survivor of them, living at the time of the decease of my wife, share and share alike." And lastly, the testator gave the residue of his estate, including any balance to his credit in the Colonial Trust Company, after the payment of his debts and funeral expenses, to his wife absolutely.

That the testator disposes of his entire estate can admit of no

Gilmore's Estate.

question. It is clear from reading the will that he intended the Merion property to be sold, and converted into money, which should be invested, and the income paid by the executors to his wife during her life. Can there be any substantial doubt that one half of the proceeds of the sale of that property were intended by the testator to go to John, but to be distributed and paid to him when the widow's life interest ceased by her death, and that the other half was to go to Mary, if she survived her mother, and if she did not, to her three brothers? There is no condition attached to the gift to John, as there is to Mary. It is given to him absolutely. There is no provision as to his surviving his mother, as there is to Mary. The absence of any such provision or condition in the gift to him conclusively shows the testator made a distinction between him and the daughter, for he expressly and very clearly states if she dies in the lifetime of her mother without issue, the share shall go to her brothers, or the survivors or survivor of them, who are living at the death of their mother. His intention as thus evidenced was that John should have one-half of the proceeds of the sale of the Merion property to be paid him after his mother's death, and that if, and only if Mary survived her mother she should have one-half of said proceeds. If she died during the lifetime of her mother leaving issue, they would take, and if she died without issue, then her brothers who survived their mother would take the share. The testator as a matter of fact intended to, and actually did, create a fund from the proceeds of the sale of the Merion property, the income from which was to be enjoyed by his wife during her life. The distribution of the proceeds was postponed until the widow's death, at which time John was to come into the enjoyment of one half, and Mary was to come into the enjoyment of the other half if she was then living. One half vested in John at the death of his father, the payment of which was postponed until after the death of his mother. The other half could not vest until the death of the mother, for the vesting is clearly fixed at the death of the mother, the period when it could only be ascertained who was to take it.

It is fundamental in construing a will that the testator's intention must govern, and that this intention is to be gathered, not from any particular words, phrase, or paragraph, but from the four corners of the will; and, as has been stated in many cases, the best way of arriving at that intention is to place ourselves in the position of the testator and from that standpoint read the will. *Packer's Estate*, (No. 1), 246 Pa. 97 (109). See also *Fox's Estate*, 99 Pa. 382.

Gilmore's Estate.

The will and the codicils are to be read together as one entire document. If the intention of the testator is manifested by the language of his will, resort to artificial rules of construction is unnecessary. Technical rules of construction should only be resorted to and applied in the interpretation of wills when found to be necessary in determining the meaning of the instrument so as to effectuate the purpose of the testator. *Wood v. Schoen*, 216 Pa. 425 (428). Rules for the construction of wills were not made to defeat, but to carry out the intention of the testator in the disposition of his estate, and hence if that intention is clearly manifested in the instrument, and is not violative of some rule of law, it cannot be defeated by the application of technical rules of construction. *Arnold v. Muhlenberg College*, 227 Pa. 321.

It has been said that the question as to whether an estate is vested or contingent has caused prolific litigation and many adjudications. It is a well settled principle that the law leans to vested rather than contingent estates; and that an interest will only be construed as contingent where it is impossible to construe it as vested. *Carstensen's Estate*, 196 Pa. 325; *Bache's Estate*, 246 Pa. 276; *Tatham's Estate*, 250 Pa. 269; *Neel's Estate*, 252 Pa. 394; *Rau's Estate*, 254 Pa. 464; *Bair's Estate*, 255 Pa. 169; *Stocker's Estate*, 260 Pa. 385. In *Raul's Estate*, *supra*, the court said,—“the whole policy of the law inclines to the vesting of legacies, and allows that policy to yield only where a contrary purpose is expressed in the will.” An interest will be construed as vested rather than contingent wherever it is possible to do so where the testator is making provision for his child or grandchildren. *Wengerd's Estate*, 143 Pa. 615; *Marshall's Estate*, 262 Pa. 145. There is another well settled principle. Where a legacy is made payable at a certain time, which is certain to arrive and is not subject to precedent condition, it is regarded as vested, even if the person is not living at the time of distribution. *Packer's Estate*, 246 Pa. 116; *McCauley's Estate*, 257 Pa. 377. And where time is not annexed to the gift, but to its payment, the estate is vested. *Sternbergh's Estate*, 250 Pa. 167. The test whether a legacy is vested or contingent is clearly stated by Justice Stewart in *McCauley's Estate*, *supra*, who quoted the language of Justice Williams in *McClure's Appeal*, 72 Pa. 414 (417): “Where a legacy is made payable at a future time, certain to arrive, and not subject to condition precedent, it is vested where there is a person in esse at the time of testator's death capable of taking when

Gilmore's Estate.

the time arrives, although his interest be liable to be defeated altogether by his own death. * * * As a general rule, a legacy is to be deemed vested or contingent, just as the time shall appear to be annexed to the gift, or the payment of it. If futurity is annexed to the substance of the gift, vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instantly. The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift, as a condition precedent. * * * Where the fund, which is the subject of the legacy, is given to another person beneficially for life * * * the legatees will take an immediate vested interest in the subject, since such bequests are in the nature of remainders. * * * Though there be no other gift than the direction to pay or distribute in future, yet if such gift or distribution appears to be postponed for the convenience of the fund or property, or where the gift is only postponed to let in some other interest, the vesting will not be deferred till the period in question. * * * The question is one of substance and not of form; and in all cases it is whether the testator intended it a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question must be sought for out of the whole will, and not in the particular expression only in which the gift is made."

One half of the ascertained balance for distribution is awarded to the administrators of John O. Gilmore, deceased, and the other half is awarded to Mary J. Montgomery.

In the Court of Quarter Sessions of Montgomery County**Commonwealth vs. Mikula**

Defendant was indicted on the charge of embezzlement. The trial of the case was continued for several terms, and when brought to trial upon request of the District Attorney, a verdict of not guilty was directed with instructions given to the jury to find as to who should pay the cost. The jury imposed the cost on Polish Alliance, of whom the defendant was a member of a committee of arrangements to raise money for his people in distress in Poland. A rule to show cause why the imposition of the cost on the prosecutor should not be set aside was made. The setting aside of the findings of a jury as to who is to pay the cost is a matter for the Court, and where the prosecutor has acted in good faith and on reasonable grounds it is within the discretion of the Court to set aside the jury verdict. In this case the prosecutor acted in good faith and upon reasonable grounds and the costs are remitted and ordered to be paid by the County, in so far as they relate to the record cost, not including witness fees and mileage and the cost of subpoenaing witnesses.

No. 94. February Sessions, 1921.

False Pretence.

Motion to remit costs.

A. H. Hendricks, Attorney for Commonwealth.

H. D. Saylor, Attorney for Petitioner.

H. I. Fox, Attorney for Defendant.

Opinion by Miller J., January 20, 1922.

BY THE COURT:

The defendant was indicted on the charges of embezzlement and fraudulently converting property under the Act of May 18, 1917, P. L. 241. The bill was found at February, 1921, Sessions and its trial was then continued until April. The case was again successively continued at the April, June and September Sessions and was not tried until November, when, after hearing the testimony, the District Attorney moved that the bill be submitted for a verdict of not guilty. The motion was allowed and the jury were directed to acquit the defendant and given proper instructions for a disposition of the costs. They placed the latter upon Polish Alliance No. 543 of Pottstown, Pa., a corporation, which they found to have been the prosecutor in the case. It now asks to have so much of the verdict as placed the costs on it set aside and to be relieved from their payment.

Perhaps, nowhere better than in *Guffy vs. the Commonwealth*, 2 Grant 66, are the supervisory, discretionary power and the duty of the court in cases of this class to be found defined. It is there said: "that the court had a supervision over so much of the verdict as related to the costs, notwithstanding the acquittal. The preamble to the Act of 1804 shows that it was not intended to authorize

Commonwealth vs. Mikula.

the jury to punish innocent prosecutors, acting upon well founded grounds of belief, in preferring charges of a character which ought to be investigated. It was enacted expressly to prevent 'restless and turbulent people' from 'harassing the peaceable part of the community with trifling, unfounded or malicious prosecutions, Where the prosecution is not 'trifling', but one of grave character; where it is not 'unfounded', but founded upon probable cause existing at the time it was commenced, but afterwards fails by the death of material witnesses; and where there is no evidence of malice in the prosecution, it is the duty of the court to set aside the verdict against the prosecutor for the costs. In short, this is the duty of the court in all cases where 'there is nothing in the testimony to show that the prosecutor behaved improperly' ". Also see *Com., appel., vs. Shaffer*, 52 Pa. Sup. Ct. 230, and the Act of April 14, 1905, section 2, P. L. 152. The provisions of section 62 of the Act of March 31, 1860, P. L. 427, which relate to the disposition of costs upon acquittal of the defendant, did not involve any material departure from the earlier statute of December 8, 1804, relating to the same subject: *Com., appel., vs. Bixon*, 67 Pa. Sup. Ct. 554, 557.

And in the recent case of *Commonwealth vs. McCarthy*, 67 Pa. Sup. Ct. 135, it is said: "Where the petitioner had notice of the proceedings, was the real prosecutor, was not a public officer enjoined by his duty to the public to prosecute, and a conviction was not prevented by the death of a material witness, the reasons which should move a trial court to grant relief, it is not required to set aside the verdict even though the prosecution was instituted in good faith and founded upon probable cause. Whether the verdict should or should not be set aside is a matter of discretion and not merely the performance of a ministerial duty".

This discretion of the court is, of course, in its nature judicial and is to be guided in its operation by the general principles that govern the exercise of judicial discretion. *Com. vs. Kocher*, 23 Pa. Sup. Ct. 65, 68; *Com., appel., vs. Bixon*, *supra*. Grant of the relief prayed for in this case is, therefore, not compulsory, but lies on its facts in our judicial, not arbitrary, discretion,

The Alliance decided, most creditably to it, to give a series of functions in Pottstown for the purpose of raising money for the relief of suffering in Poland and the defendant, who was one of its members, was appointed chairman of the committee of arrangements. His duties were many and their proper performance required him to make several trips to Philadelphia, to hire music and

Commonwealth vs. Mikula.

costumes and to attend to other details. The enterprise proved successful and a small portion of its proceeds came properly into the possession of the defendant. When it was over and settlement with him was attempted, he claimed that all of the receipts which were in his possession but partially reimbursed him for his outlays. Other members reasonably took exception to the propriety of some of his expenditures and to what they regarded as the excessive amounts of others. They became convinced that he purposed unworthily to enrich himself out of the moneys so worthily raised. A bitter dispute ensued and, during its progress, those adverse to the defendant consulted a local justice of the peace, who advised the defendant's prosecution. Finally, after long negotiations, unable to obtain from the defendant any of the moneys in his hands, counsel was requested by the justice to prepare an information and a warrant for his arrest was issued. The information was made by a committee of the Alliance. The case was returned to court on the advice of the district attorney and, after many delays, for none of which the Alliance was responsible, at last called for trial. It was rightly disposed of on the testimony because, under it, the whole matter resolved itself into nothing more than a dispute concerning defendant's deductions, some of which were, as stated, charged by the Alliance to have been extravagant in amount, and others wholly improper, but all of which the defendant claimed to be proper and justified.

The costs were greatly swelled by the large number of witnesses subpoenaed, the great distances they had to travel and the many continuances of the case. The Alliance did not have private counsel to assist in its prosecution. Many of the Commonwealth's witnesses, who are members of the corporation, have released their fees and mileage.

It remains only to mention that it developed at the trial that, during the negotiations with the defendant, which preceded the issuance of the warrant, the President and Treasurer of the Alliance, then in office, had made a settlement with him and paid to him the sum of \$38.23 to cover the excess of his expenditures over his receipts, and that their action was afterwards repudiated by the Alliance and they were removed from office. Also, that the American Consul General of the Republic of Poland became interested in and encouraged defendant's prosecution.

We are of the opinion that, under these facts, the petitioner is entitled to the relief for which it prays. The enterprise out of

which the trouble arose was inspired by the noblest impulses—the relief of those in suffering and distress. The Alliance was keen that the money it raised from the charitably disposed should not be eaten up by overhead and was quick to resent that which had all the appearances of an effort by the defendant fraudulently to profit by his connection with the effort. His extravagant claims even exceeded his collections. His attitude had all the appearance of guilt under the Act of 1917. The Alliance was slow to act, however. It exhausted every effort to obtain a settlement. Much time was consumed. After it had failed, the matter was taken to a local justice of the peace. He was no more successful. The defendant was indifferent and defiant. The justice advised prosecution and the committee of the Alliance decided to act on the advice. The official had a lawyer prepare the information. After the warrant was issued, the case was held for a long time, because of defendant's promises of payment. He failed to keep these promises, was finally given a hearing and held for court, and the district attorney advised a return of the case. It was the object of much public interest and comment and, as stated, even the American representative of the Polish Government gave encouragement to the Alliance in its efforts to obtain justice. After the great delay in the trial of the case its outcome was not surprising.

The prosecution was not trifling, under the circumstances, and was instituted in good faith and founded upon probable cause. The charges preferred ought to have been investigated. There was no evidence of malice or improper behavior on the part of the prosecutor. The assistant district attorney who tried the case joins in the application, which is opposed only by the County Solicitor. This part of the verdict was a surprise to the trial judge, who expected the costs to be placed on the county. It can be explained only on the theory that one or more members of the jury were possessed of the preconceived mistaken notion that, regardless of the facts of a case, the county, that is the tax-payer, should not be visited with the payment of its costs. Injustice will be done by allowing the verdict to stand.

AND NOW, January twentieth, 1922, the rule is made absolute, so much of the verdict of the jury as imposed the costs on Polish Alliance No. 543 of Pottstown, Pa., is set aside, it is relieved from their payment, and the county is ordered to pay the costs of prosecution, not including, however, the fees and mileage of either the Commonwealth's witnesses, who have released the same, or any of the defendant's witnesses, or the costs of subpoenaing the latter.

In the Court of Quarter Sessions of Montgomery County**Commonwealth vs. John Petck**

Defendant was indicted on the charge of mayhem in that he bit the finger of the prosecutor, which according to medical testimony was the direct cause of its amputation. Defendant moved for a new trial alleging that there was no severance of the finger at the time of the conflict. Under the act governing the crime of mayhem severance is not necessary at the time of the combat, but if it is the result of the combat and a jury so found, then defendant is guilty and a new trial must be denied.

No. 1 February Sessions, 1922.

Mayhem.

Motion for a new trial.

Frank X. Renninger, Attorney for Commonwealth.

William & Egan, Attorneys for Defendant.

Opinion by Miller J. March 30th, 1922.

The indictment, which was laid under section 80 of the Act of March 31, 1860, P. L. 403, charged the defendant with unlawfully, voluntarily, maliciously and of purpose biting off the finger of his opponent in a fight. He was convicted, and the only reason that he assigns in support of his motion for a new trial is that the evidence failed to disclose that he had done so, within the meaning of the act. The verdict justifies, and a correct understanding of the exact question involved requires, the following brief statement of facts.

These two men, both of whom were drunk, had met on the evening of last Armistice Day at the home of a mutual friend where their noise and disorder soon disturbed the sleeping children, and they were ordered to leave. As they did so, together, the prosecutor invited his companion to fight outside. Neither had any weapon, other than his natural ones. The invitation was accepted and the combat took place in the street. They were soon separated, but not until after the defendant had succeeded in getting into his mouth and biting severely the ring finger of the prosecutor's right hand.

Little was thought of the injury at the time and the latter returned to his work as a moulder on the following day. The finger was first treated by his wife with home remedies, but it grew gradually worse. On the fourteenth, the nurse at prosecutor's place of employment gave it some attention. Thereafter, and for several days, a nearby druggist looked after it, but, as it had become infected, he finally urged the prosecutor to go to the local hospital. He did

so on the eighteenth, by which time gangrene had set in. All was done by the hospital that could be done, but the condition of the finger kept getting worse. In consequence, it became necessary to amputate it at its second joint, and the same was done on December 28th. The question raised by the motion is whether or not these facts are sufficient to support the verdict, or, as it may be otherwise expressed, are they sufficient to constitute a biting off, within the contemplation of the act, which must, of course, be construed strictly?

In the first place, the defendant bit the finger severely and it is now off, in that it has been amputated at the second joint.

And in the next, the surgeon who performed the operation, but, of course, knew nothing about the original circumstances, testified concerning the condition of, and the marks upon, the finger when he first saw it on November 18th: said that, in his opinion, both might have been caused by the bite of human teeth; and stated that the ultimate amputation was the direct consequence of the original injury. There was no testimony in the case from which it could have been found, or reasonably inferred, that the loss of the finger was the effect of any independent, intervening cause. It was, therefore, expressly left to the jury, under proper instructions, to find from the testimony whether or not such loss was the direct consequence of defendant's act and the verdict indicates that they found that it was.

The Commonwealth discharged its burden of proving affirmatively and beyond a reasonable doubt, by either direct or circumstantial evidence, that the act of the defendant had been performed with the requisite specific intent and it followed, necessarily, that the defendant was presumed to intend, and might be held responsible for, the necessary, or the natural and probable, consequences of his voluntary act. This general principle of law was referred to by Mr. Justice Agnew in *Com. vs. Drum*, 58 Pa. 9, where, at page 17, he says:

"He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon * * *, must, in the absence of qualifying facts, be presumed to know that his blow is likely to kill; and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act."

A specific intent to maim is generally held an essential ingredient of the offense of mayhem and is made such by our Act of 1860; but even such intent may be inferred or presumed if the act was done

Borough Jenkintown vs. Transit Co.

deliberately and the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act. See L. R. A. 1916 E, note, page 494, and cases cited; and 40 L. R. A. (N. S.) 1132, note; and *People vs. Nunes*, 190 Pac. 486.

Whether the injury is of the character necessary to constitute mayhem must ordinarily be determined by the jury (*Green vs. State*, 15 A. & E. Ann. Cases, 81), whose function it was in this case also to pass upon the related question of fact of whether the ultimate amputation of the finger was the direct, natural, or probable, consequence of defendant's unlawful act. In light of the testimony and all the circumstances no fault is to be found with their verdict. The act, in making the biting off a limb or member of an opponent, while fighting, a misdemeanor, does not, in our opinion, require its severance to be immediate and during the fray. It is none the less a violation of the law if the injury is inflicted during the encounter, but the actual severance, which is made necessary by that injury and follows as a direct and probable consequence of it, does not take place until afterwards.

And now, 30th March, 1922, the motion for a new trial is overruled, the reason is dismissed and the defendant is ordered to appear for sentence in court room No. 1 on Monday, April 3rd, 1922, at 10.00 A. M.

In the Court of Common Pleas of Montgomery County

Borough of Jenkintown vs. Philadelphia Rapid Transit Co.

Plaintiff sued defendant for the cost of repaving a street, upon which defendant filed its affidavit of defense alleging that the ordinance under which the plaintiff claimed right to bring suit was not approved by the Public Service Commission, that there was no contract between the relative parties, and that the notice to repair was not served on the original contracting party.

The ordinance in this case was passed some years prior to the creation of the Public Service Commission, and as the act creating said commission was not retroactive, therefore, the Public Service Commission would have no jurisdiction concerning the operation of this ordinance, and as the defendant has acknowledged the existence of the ordinance by doing work in accordance with its provisions it has brought itself under the said ordinance, they cannot now claim a lack of privity of contract, therefore, the questions of law raised on the affidavit of defense must be overruled and defendant given leave to file a supplemental affidavit.

No. 38, February Term, 1922.

Assumpsit,

Affidavit of defense raising question of law.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

MONTGOMERY COUNTY

Borough Jenkintown vs. Transit Co.

Opinion by Swartz, P. J., May 22, 1922.

The plaintiff borough passed an ordinance on May 28, 1894, granting to the Philadelphia, Cheltenham and Jenkintown Passenger Railway Company the right to lay trolley tracks on the Old York Road and maintain and operate the same by electricity, in the borough of Jenkintown.

The Seventh Section of the said ordinance imposed the following conditions: "The said Railway Company shall, at its own cost, keep the highway on which its tracks are located and the gutters along said highway, in good repair, and upon failure of said Company, its successors or assigns, to keep said highway in repair, the Council of the said borough having first given ten days' notice to the President or Secretary of said Company, so to do, may repair the same, at the expense of the said Railway Company, and said expenses may be recovered against said company, as debts of like amount are by law recoverable."

"The said Council shall be the judges of the necessity of repair."

The statement alleges: "That the Philadelphia Rapid Transit Company, the defendant in this action, is the successor of the Philadelphia, Cheltenham and Jenkintown Passenger Railway Company, and that, as such, exercises and enjoys the franchises given to its predecessor, and operates a trolley line on the said Old York Road, in said borough, and that as such successor it has succeeded to the rights as well as the obligations of the said Philadelphia, Cheltenham and Jenkintown Passenger Railway Company, in said ordinance given or by it imposed."

The statement also sets forth, "that the said defendant company has for many years, from time to time, maintained and repaired the said Old York Road, in said borough, at its own cost and expense, in performance and acknowledgment of the above obligation so to do."

The Old York Road in Jenkintown borough, upon which the defendant company operated its railway, was out of repair, and on April 27, 1921, the President of the defendant company was notified, that unless the repairs were made, within thirty days, the borough would commence proceedings to enforce compliance with the requirements of the said ordinance.

The repairs were not made by the defendant company, as required by the notice.

The borough then made the same and claims, that it incurred an expense of \$582.33, in doing the work and supplying the materials.

This suit was brought against the defendant, the Philadelphia

Borough Jenkintown vs. Transit Co.

Rapid Transit Company, to recover the money so expended in making the repairs aforesaid.

The defendant company filed an affidavit of defense raising questions of law as to the sufficiency of the plaintiff's statement.

The defendant company assigns the following reasons: (1) That notice to repair was not served on the original company, the Philadelphia, Cheltenham and Jenkintown Railway Company; (2) That there was no contract or privity of contract between the said borough and the defendant company, and that therefore no right of action against the defendant was established by serving the notice to repair on the defendant company; (3) That the ordinance under which the plaintiff borough brings the action was never approved by the Public Service Commission; and (4) That the matter referred to in the statement involves facilities, regulations and practices concerning the defendant company which are within the exclusive jurisdiction of the Public Service Commission.

The ordinance in question was enacted in 1894. The Public Service Commission had its origin, under the statute, approved July 26, 1913, P. L. 1374. Ordinances passed prior to 1913 are not subject to approval by the Public Service Commission. The provisions of the Act of 1913 are not retroactive; *Collingdale Borough vs. Philadelphia Rapid Transit Co.*, decided May 8, 1922, but not yet reported.

The case just cited also declares that an action in assumpsit in the Common Pleas is the proper method to enforce the obligations arising under the contractual relations between the borough and the railway company established under the ordinance. The railway company must comply with the obligation and cannot evade it, because it may be burdensome; *Reading vs. United Traction Company*, 215 Pa., 250; *Chambersburg vs. Chambersburg Railroad*, 258 Pa., 57; *Collingdale vs. Philadelphia Rapid Transit Co.*, *supra*.

The *Collingdale* case raised the question, whether the borough could sue the railway company in assumpsit, to recover the moneys expended in repairing a street that the railway company was bound to repair under the ordinance conferring the right to occupy the street.

It was contended in that case that the borough must apply to the Public Service Commission to seek redress. The Court did not sustain this position but declared: "the contracts of 1899 and 1903 did not require the approval of the Public Service Commission, and hence were not brought within its control. It cannot therefore be

Borough Jenkintown vs. Transit Co.

held that the jurisdiction of the Court to enforce the conditions, upon which the franchise rests, was taken away."

The only remaining question relates to the right of the borough to sue the defendant company which is the successor to the parent railway named in the borough ordinance.

It must be noted, that the Philadelphia, Cheltenham and Jenkintown Railway contracted not only for itself but for "its successors and assigns." The ordinance under which the parent corporation accepted the franchise so declares.

Nor can the defendant company plead ignorance of this provision in the ordinance. The statement alleges, "that for many years the defendant company repaired the streets, at its expense, in performance and acknowledgment of the above obligation so to do." The words "above obligation" refer to the Seventh Section of the ordinance before us.

Again we refer to the Collingdale case, which seems to cover all the questions of law raised in the defendant's affidavit.

The Court in speaking of the obligation, on the part of the railway company to make repairs under the terms of the ordinance, adds, "and this liability extends to the merged or leased company; Philadelphia vs. Passenger Railway, 169 Pa., 269." See also Philadelphia vs. Ridge Avenue Railway, 143 Pa., 444.

How can a leasing company enjoy the use of the streets without complying with the conditions imposed under which the use was granted? The mutual obligations of the contracting parties are continuous.

The plaintiff's statement shows, that under the law the defendant company as lessee was obliged to make the said repairs. It follows that the notice was properly served upon the president of the said company.

Counsel for defendant contends that because there is no allegation in the plaintiff's statement, that the Philadelphia, Cheltenham and Jenkintown Company accepted the conditions of the borough ordinance, the statement is insufficient.

No such legal question is raised in the affidavit. On the contrary, the defendant declares in its affidavit, that the Philadelphia, Cheltenham and Jenkintown Company is the only party with which the borough contracted or purported to contract. This is a recognition of the actual existence of a contract between the borough and said company.

But aside from this admission, the use of a franchise constitutes an acceptance. The act of the company in using the streets

Townsend vs. Academy P. E. Church, Phila.

is sufficient as an acceptance; McQuillan Municipal Corporations, Vol. 4, page 3467.

The railway companies for years complied with the conditions imposed by the ordinance. Even if the borough could at this late day take advantage of the failure to accept the ordinance, if there was such failure in fact, still we do not see how the Philadelphia, Cheltenham and Jenkintown Company or the defendant, its successor, could plead its own wrong, in taking possession of the street without filing its acceptance of the ordinance with the borough.

As the affidavit does not raise this legal question we shall not continue the discussion.

AND NOW May 22nd, 1922, the Court decides against the defendant on the questions of law raised and leave is given to file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days.

In the Court of Common Pleas of Montgomery County

Townsend vs. Trustees of Academy of Protestant Episcopal Church, of Philadelphia.

Plaintiff filed her bill against defendant for interfering with the use of a small stream by discharging sewage and waste water into the same. The defendants filed a demurrer to the bill stating that no public nuisance is alleged, and small stream by discharging sewage and waste water into the same. The defendant that only a private trespass is set up, and that the plaintiffs have a full remedy at law. Under the Act of 1905, any interferences with the use of running stream of water by polluting the same, becomes an act which can be restrained by the Courts of Common Pleas having jurisdiction to restrain public nuisance. The demurrer is overruled with leave to defendant to file an answer to said bill.

No. 2, February Term, 1922.

Equity, Demurrer to Bill.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendants.

Opinion by Miller, J., May 29th, 1922.

The bill avers that the complainants are owners in fee of real estate at Overbrook, in Lower Merion Township, over which there has flowed, since time immemorial, a natural stream of clear, spring water, into which, they first discovered in November, 1921, all the defendants, some of whom are upper riparian owners. had, for some time, been discharging sewage from water-closets, kitchen and other house-

Townsend vs. Academy P. E. Church, Phila.

hold uses thereby defiling it and making it an ordinary sanitary sewer for their own benefit and convenience."

The bill further avers damage to the complainants, by reason thereof, that is special to them and may be fairly characterized as incapable of measurement by any ordinary accurate standard, or, in legal parlance, that is irreparable (Kramer, appel., vs. Slattery, 260 Pa., 234, 242), and that the complainants are without adequate remedy at law. It prays for an injunction.

The defendants demur to our jurisdiction to entertain the bill because:

1. No public nuisance is alleged.
2. No private nuisance is alleged, only a private trespass is set up.
3. At most, upon the face of the bill, a full remedy is provided by the Act of April 22, 1905, P. L. 260.

The demurrer must be overruled. In Commonwealth, appel., vs. Kennedy, 240 Pa., 214, the Court, after discussing Commonwealth vs. Yost, 197 Pa., 171, and pointing out the reasons which afterwards caused the passage of the Act of 1905, which declares it to be a misdemeanor to discharge sewage into "the waters of the state," goes on to say that, under this act, "the matter takes on an entirely different aspect when it is sewage that is discharged into a running stream, * * * * The act defines 'waters of the state' to mean 'All streams and springs, and all bodies of surface and ground water, whether natural or artificial, within the boundaries of the state.' This does not make all such streams public streams, but it does subject them to police control, because, while not public streams, they are susceptible of being turned into public nuisances. * * *

It is not necessary to constitute a public nuisance in running water that the stream should be a public stream. Because the public health is endangered by drainage of sewage into any flowing stream, the legislature has denounced it as an offense on the part of any one permitting it. In no more positive way could it be declared a public nuisance." The drainage by defendants of sewage into the flowing natural stream which tranverses complainants' land is, therefore, even though, to suit their convenience, it is artificially covered, a public nuisance.

Townsend vs. Academy P. E. Church, Phila.

Nor is the only remedy for a violation of the act to be found in the enforcement of the penalty which it provides. As to this branch of the case we again quote from Commonwealth, appel., vs. Kennedy, *supra*, where it is declared: "We need only refer to what was said by this Court in Bunnell's Appeal, 69 Pa., 59: 'It is not to be denied that the Supreme Court and the several courts of the Common Pleas have jurisdiction to restrain public nuisances, under certain circumstances. * * * But the power will be exercised only when the right is clear and not doubtful, and when the threatened injury is of a permanent, or an irreparable character. The mere fact that there is a remedy at law by indictment or action will not alone prevent the exercise of the power, but it is a reason why the jurisdiction of chancery should be confined to cases of a very plain character, where the injury is irreparable and cannot await the slow progress of the legal redress.'"

The case there before the court was pronounced a plain one and such is equally true of that averred here. The demurrer, of course, admits all material facts and inferences well pleaded in the bill: Schuler vs. Schuler, appel., 39 Pa. Sup. Ct., 635; Wilson, appel., vs. Brown, 269 Pa., 225.

Equity, it is true, will not ordinarily interfere by injunction at the instance of private individuals to restrain the commission of a purely public nuisance, and such a suit can be instituted only by the proper public officers in the name of the public: Sparhawk vs. Union Pass. Railway Co., 54 Pa., 401; Alexander, appel., vs. Wilkes-Barre A. C. Co., 254 Pa., 1, 8; but there is an exception to this general rule that is as well established as the rule itself. An individual may bring an action on account of a public nuisance when he can show that he has sustained therefrom damage of a special character, distinct and different from the injury suffered by the public generally—beyond that suffered by him in common with all others affected by the nuisance: Knowles vs. Penna. R. R. Co., appel., 175 Pa., 623; Rhymer vs. Fretz, appel., 206 Pa., 230; Alexander, appel., vs. Wilkes-Barre A. C. Co., *supra*; Fox Chase M. E. Church, *et al.*, vs. The Country Club for Enlisted men, 35 M. L. R., 224. Such special injury is, in our opinion, sufficiently averred here to give the court ju-

Monaghan vs. Academy P. E. Church, Phila.

risdiction to restrain a public nuisance at the suit of individual complainants.

And, in conclusion, we observe that, as this is a case of neither recurring or continuing trespasses nor private nuisance, Kramer, appel., vs. Slattery, *supra*, and Vandivort, appel., vs. Hunter, *et ux.*, 265 Pa., 585, have no application, and on the facts, as they are now before us, and under the disposition made of the demurrer, the act of June 7, 1907, P. L. 440, has no present application.

And now, 29th May, 1922, after hearing, the demurrer is overruled and the defendants are required to answer the bill within thirty days of this date.

In the Court of Common Pleas of Montgomery County

Monaghan vs. Trustees of Academy Protestant Episcopal Church, Philadelphia, Inc.

Complainant was owner of a lot out of tract of which defendants were also owner of other lots. In the original conveyance two roads were reserved in the deed with the free and common use of the said roads at all times hereafter forever. These two roads formed a T. The defendant purchased lots forming the East arm of the T. and proceeded to lay a running track across this arm about three feet below the established surface of the road. Complainant filed her bill in equity praying that the defendants be restrained from obstructing the road and that they be further ordered to place the road in its original condition.

Defendant alleged that the only value of this grant was to give the complainant a right of exit to the public road and no right to use the east arm of the T. The contention of the defendant, however, cannot be sustained by the wording of the deeds, and equity has jurisdiction to restore the streets as originally laid out to the use of all the owners, so that there will be no substantial interference to plaintiff's passage-way over the same.

No. 1, April Term, 1921.

Equity.

Hearing on bill, answer and proofs.

Monroe H. Anders, Attorney for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Swartz, P. J., November 26th, 1921.

The plaintiff alleges in her bill, that the defendant Academy cut off, closed up and destroyed a part of an alley or avenue, and thereby deprived her of the free use and enjoyment of the said alley or street as an appurtenance to her property.

Monaghan vs. Academy P. E. Church, Phila.

The defendant answers that cutting off a section of the avenue did not deprive the plaintiff of any of the rights, purposes and uses for which the avenue was granted and established.

FINDINGS OF FACT.

1. John O. Gilmore, on May 15, 1899, purchased from George H. Wentz and wife, a tract of land, situate in Lower Merion township and fronting on City Avenue.

The tract contained nine acres and fifty-two perches of land.

2. He divided the said tract into eleven lots and, on August 3, 1899, spread upon the records of the Recorder's office, at Norristown, a draft showing the subdivisions and streets on the tract. Ten of these lots taken together formed a rectangle fronting on the north side of City Avenue.

He laid out a street or avenue, thirty-two feet wide and at right angles to City Avenue.

On the west side of this street he numbered the lots 1, 3 and 5; lot No. 1 fronts on City Avenue. On the east side of this laid out street, he numbered the lots 2, 4 and 6; lot No. 2 fronts on City Avenue.

At the north end of the said street so laid out he provided another road parallel to City Avenue, and connecting with the avenue or road just described. This second street was about four hundred and sixty feet long. It was also laid out thirty-two feet in width. On the north side of this street he plotted four lots and numbered them, from west to east, 7, 8, 9 and 10.

Lot No. 11 was the largest tract and adjoined the said rectangle along its eastern boundary.

The two streets, so laid out, formed the letter "T."

3 The following sketch will show the location of the eleven lots and their relation to the two streets or avenues so laid out by the owner, John O. Gilmore.

The first laid out street, connecting with City Avenue, was afterwards named Berwick Road.

MONTGOMERY COUNTY

Monaghan vs. Academy P. E. Church, Phila.

N.

| Plaintiff lot No. 7 | Maron lot No. 8 | Wilson lot No. 9 | Wilson lot No. 10 | No. 11 |
|---------------------------|-----------------------|------------------------|-------------------------|--------|
|---------------------------|-----------------------|------------------------|-------------------------|--------|

ROAD OR AVENUE

| | | | | |
|-------------|-------|--------------|--------|----|
| W. | No. 5 | BERWICK ROAD | No. 6 | E. |
| | | | No. 11 | |
| | No. 3 | | No. 4 | |
| | No. 1 | | No. 2 | |
| CITY AVENUE | | | | |

S.

4. The plaintiff now owns Lot No. 7 and the defendant Academy is the owner of 2, 4, 6, 9, 10 and 11, and uses the said six other lots in connection with other lands as one tract for school purposes.

5. The deed in which the draft of the eleven lots and the two streets are made a part of the record is found in Deed Book No. 463, page 179.

6. All the lots are described in this deed by courses, distances and boundaries.

The west arm of the top of the "T" is 238 feet long measured from the middle of Berwick Road; and the east arm of the "T" is 235 feet long measured from the same point. The two streets so laid out are each thirty-two feet wide.

As to lots 5, 6, 7, 8, 9, 10 and 11, after each is separately described these words follow: "Together with the free and common use, right, liberty and privilege of the said two roads or avenues thirty-two feet wide, at all times hereafter forever."

As to lots 1, 2, 3 and 4, the words are: "Together with the free and common use, right, liberty and privilege of the said road or avenue thirty-two feet wide, at all times hereafter forever."

7. John O. Gilmore died, intestate, in 1919, and the said lots, so far as they were not sold and conveyed in his lifetime, vested in his widow and their children.

These heirs made title to the plaintiff on September 25, 1919, for lot No. 7. Reference is made in this deed to the draft aforesaid recorded in Deed Book 463, page 179.

8. The plaintiff's deed contains the following grant, as to the avenues laid out in 1899, and entered of record:

"Together with the free and common use, right, liberty and privilege of said thirty-two feet wide private road and the said Berwick Road extending from City Avenue back through and adjacent to other property of the said grantors, in common with the owners, users and occupiers of all residences erected thereon, upon either side thereof, including residences erected upon the said private road at the end of said Berwick Road, and for all other public uses in connection with said residences."

In this deed the street forming the top of the "T" is fully described as to its location and length.

9. The deed to the defendant Academy was made by the same grantors, but not until August 11, 1920. The deed embraced lots 2, 4, 6 and 11.

The under and subject clauses, in this deed, read as follows: "And it is further hereby covenanted by the grantors, their heirs and assigns, that Berwick Road, extending from City Line back through and adjacent to other property of the grantors and now a private thoroughfare is

Monaghan vs. Academy P. E. Church, Phila.

hereby and shall remain open for and to the public use of all residences erected upon either side thereof including residences erected upon the street at the end of Berwick Road, and for all other public uses in connection with said residences."

"And that the above mentioned private road is hereby and shall forever remain open for and to public use of all residences erected upon either side thereof in connection with the said Berwick Road."

Lot No. 6, included in this conveyance, abuts on the south side of the east arm of the "T."

10. Lots No. 9 and 10 abut on the north side of the east arm of the "T."

These lots were conveyed by the heirs of John O. Gilmore, on October 22, 1919, to the wife of A. J. Wilson. This deed was subsequent to the plaintiff's title. In the Wilson deed the grantors covenanted that the aforesaid private road thirty-two feet wide, and also Berwick Road, thirty-two feet wide, now a private thoroughfare shall forever remain open for public use for the benefit of all the owners and occupiers abutting on said roads.

On October 8, 1920, these lots, numbered 9 and 10, were conveyed by Mrs. Wilson and her husband to the defendant Academy, subject to all the conditions named in the said deed of the Gilmore heirs to Mrs. Wilson, recorded in Deed Book No. 799, page 41.

11. The two roads forming the "T" were well defined on the grounds when the defendant Academy purchased lots 2, 4, 6, 9, 10 and 11. They were both opened to their full width of thirty-two feet throughout their whole lengths. There was a hard macadam road bed with rounded brick side gutters for surface drainage. They had the appearance of well constructed permanent roads. The evidence shows that they were very substantial roads.

12. The defendant Academy, in preparing an athletic field and boys' race track used its property abutting on Berwick Road, and also some of its lands crossing the east arm of the "T." The athletic field and running track, as laid out and opened on the grounds, occupied the east arm of the "T" and extended one hundred and five feet beyond and north of this east arm of the "T."

Monaghan vs. Academy P. E. Church, Phila.

The whole of this east arm of the "T," except about forty feet next to Berwick Road, is included in the athletic field. The race track is an elliptical course constructed over the outer limits of the athletic field,—that is, surrounds the whole field,

13. The bed of the athletic field and track is about three and one-half feet below the level of the surface of Berwick Road and the east arm of the "T."

Nearly two hundred feet of this east arm of the road is cut off and destroyed for all uses by automobiles, carriages and other vehicles, and also for pedestrians. At the point where this east arm is cut off, the bank of the race track is steep and abrupt. The stub of the arm remaining is only forty feet long, measured from the middle of Berwick Road. A log or pole is laid across the road at the point where the race track cuts this east arm.

The action of the defendant Academy shows, that this east arm is destroyed as an avenue or alley except as to the forty feet next to Berwick Road. The academy appropriated the street for its private uses to the exclusion of the plaintiff and all the other owners abutting on Berwick Road, or on the street forming the top of the "T."

14. The defendant Academy could construct a standard athletic field and running track, on its grounds, by shifting the field a little more than one hundred feet to the south along Berwick Road. This would bring the field that much nearer to City Avenue.

There is a gradual elevation of the defendant's ground, from the south end of the existing athletic field toward City Avenue. To clear the east arm of the "T" it would be necessary to cut down this higher ground. The cut at the extreme south end of the field, as relocated, would range from 10 to 15 feet. The extension to the south would also require the removal of some trees that now form an attractive grove. To properly slope this cut would bring the top bank about 40 feet from City Avenue.

15. The plaintiff and others used the street forming the top of the "T" in their walks and for exercise. It was also used for recreation by nurses and children from the homes located on the two streets. The west arm of the "T"

Monaghan vs. Academy P. E. Church, Phila.

was the only means of access to the residence abutting on that arm for automobiles and carriages.

When match games or races take place on the Academy's athletic field, there is a congestion along Berwick Road by reason of visitors on foot or by automobile. If the entire east arm remained open for use, it would give considerable relief to this congestion. If the stub end of the east arm, next to Berwick Road, is kept open, it would allow automobiles to run into this end still remaining to reverse the machines. They cannot turn on Berwick Road, especially when that avenue is congested, with other machines. If this stub is occupied with parked autos, as we saw it on our visit to the premises, then any large machine to turn around would have to run up the west arm of the "T" and use the plaintiff's or Mrs. Maron's driveway to make the turn.

The top of the "T" as laid out and opened was always a blind alley at both ends.

16. When the defendant corporation made its plans to cut off the eastern arm of the "T" the plaintiff served written notice upon the Academy that she would prevent such elimination of the street by legal process. The defendant disregarded this notice so served and entered upon the work of cutting off the section of the street already described. The work, so far as the destruction of the street is concerned, is now fully completed. The race track and athletic field occupy the ground upon which the road was located and opened, but the surface of the track is three and one-half feet below the level of the road as it had existed.

DISCUSSION.

John O. Gilmore laid out and opened the two avenues forming the letter "T." They were well defined streets, on the ground, and constructed with macadam and brick gutters. To the eye they gave every evidence of permanent existing streets.

When Mrs. Willson sold lots 9 and 10, abutting on the north side of the east arm of the "T," this open existing road confronted the representatives of the Academy corporation. The same is true when the academy purchased lots 2, 4, 6 and 11. Lot 6 abutted on the south side of the east arm of the "T." When the Academy took title from Mrs. Willson for

Monaghan vs. Academy P. E. Church, Phila.

lots 9 and 10, the said corporation also knew that Mrs. Willson held the lots subject to the condition that both streets of the entire "T" must be kept open for the benefit of the owners and occupiers abutting on said roads. The deed to Mrs. Willson made this clear. It declares—"that the aforesaid private road, thirty-two feet wide and also Berwick Road, thirty-two feet wide, now a private thoroughfare, shall forever remain open for public use for the benefit of all the owners and occupiers abutting on said roads."

The Academy took title to lots 9 and 10 subject to the aforesaid condition. Its title could rise no higher than that of Mrs. Willson.

When the heirs of John O. Gilmore conveyed to the plaintiff lot No. 7, they still owned lots 2, 4, 6, 9, 10 and 11, afterwards deeded to the Academy. The title of the heirs to these lots ran to the middle of the streets or alleys. They could impose any burden they saw fit on their own lands in favor of the plaintiff. They owned the land and could give a valid covenant that the two streets should remain open for her use and the use of others. This grant they made, and in no uncertain words. When the draft was placed on record in the Recorder's office, the deed declared that lot No. 7 "should have the free and common use, right, liberty and privilege of the said two roads or avenues thirty-two feet wide, at all times hereafter forever."

The rights of the plaintiff in the two streets were clearly set out in the deed made by the heirs to the plaintiff.. We shall repeat the words, because they are all important in the issue before us:—"Together with the free and common use, right, liberty and privilege of said thirty-two wide private road and the said Berwick Road extending from City Avenue back through and adjacent to the other property of the said grantors, in common with the owners, users and occupiers of all residences erected thereon, upon either side thereof, including residences erected upon said private road, at the end of said Berwick Road, and for all other public uses in common with said residences."

It is contended, on the part of the defendant, that the private road forming the top of the "T" must be preserved for the use of the plaintiff only so far as she may need it in connection with her use of Berwick Road. One of the pro-

Monaghan vs. Academy P. E. Church, Phila.

visions in the deed from the heirs to the defendant Academy is cited to support this position. This clause reads,—“and that the above mentioned private road is hereby and shall forever remain open to and for public use of all residences erected upon either side thereof in connection with the said Berwick Road.” But if we read in the deed the provision immediately prior to the paragraph just cited (see our ninth finding), it will appear that both streets are to remain open for the use of all residences erected on them.

The clause upon which the defendant relies, states that the private street shall forever remain open for and to public use. “In connection with Berwick Road” is not intended to limit the grant. It means she can use both roads, as the one connects with the other.

How can the street remain open for use if one-half of it is destroyed? Of course this second street must remain open in connection with Berwick Road. Its use would be very much curtailed if Berwick Road were closed. The clause does not say, that the second street may be cut off with impunity, provided the plaintiff still has room to reach Berwick Road. This second street is recognized, in the defendant's deed, as an open existing street, upon which other lots abut. But if the heirs in their deed to the defendant intended to cut down the prior grant made to the plaintiff, such attempt in favor of the defendant Academy can not prevail. They cannot, by a subsequent deed, without the consent of the plaintiff, take away that which was clearly conveyed to her.

That the two streets were to remain open, for all time, for the use of the owners abutting thereon, is not open to controversy, under the dedication of the roads by the owner of the lots and under the subsequent grants made by him and his heirs to the purchasers of the lots.

When the law is applied to the undisputed facts, the defendant Academy can offer no justification for the destruction of one-third of the street dedicated and opened for the use of the lot owners abutting thereon, when in addition such use is granted to them by deeds from the original owner of the lots.

True, the eastern arm of the “T” was not as useful and valuable to the plaintiff as the western arm, but she and her family made frequent use of the whole street, for walks,

Monaghan vs. Academy P. E. Church, Phila.

recreation and exercise. The open street added to the outlook of her property. The two streets, as opened, made the development of the whole tract more attractive for the abutting owners and more desirable for the occupants of the residences. The closing of the eastern arm imposes additional burdens on the remaining part of the street, especially so when the defendant Academy, by its athletic contests, overtaxed the capacity of the streets that remained.

The lots with their convenient, well located streets formed a quiet residential retreat. The crowds, in attendance at the athletic games, changed the quiet of the neighborhood at such times. To this condition the plaintiff and her neighbors must submit, but it would seem that the introduction of this disturbance should, of itself, suggest an avoidance of the additional inconveniences occasioned by the deprivation of a street dedicated for the use of the lot owners as early as 1899. Even if the plaintiff and her family made but slight use of the east arm of the street, that fact was no justification for the act of the defendant in cutting off and eliminating this part of the street. A right to a way or street created by grant is not lost by non-user; *Erb vs. Brown*, 69 Pa., 216; *Nickles vs. Cornet Band*, 52 Pa., Superior Ct., 145.

Where the right to the use of a street is created by deed, the Court will protect such use without consideration of the comparative injury to the parties from granting or withholding the injunction; *Hacke's Appeal*, 101 Pa., 245. The question of comparative injury can not arise in this case, where there is an invasion and destruction of a right granted by deed. "No man can complain that he is injured by being prevented from doing that which he has no right to do. Nor can it make the slightest difference, that the plaintiff's property is of insignificant value to him, compared with the advantages that would accrue to the defendant from its occupation;" *Sullivan vs. Steel Co.*, 208 Pa., 555.

The sale of lots, according to a plan which shows them to be on a street, imposes a grant or covenant in favor of the purchaser, that the street shall forever be open to use; *Transue vs. Sell*, 105 Pa., 604. This rule of law is sufficient, in its application to the case before us, to establish the plaintiff's right to a decree for the restoration of the eliminated street.

Monaghan vs. Academy P. E. Church, Phila.

But she is also justified in her right by the grant in her deed which declares, that the two streets must remain open forever for her use in common with the other lot owners. This latter grant or covenant strengthens her right to invoke equity process to compel the restoration of the street destroyed by the defendant Academy.

"When one owns property by title sufficient to give him entire dominion over it, he can grant it all or reserve portions of it as he pleases. So may he dedicate it to uses not contrary to law, either public or private, and it is only by lawful process or the assent of those for whose use the dedication was made, that any change can be made. It is not for one citizen to disregard the lawful exercise of rights by others; *Davis vs. Sabita*, 63 Pa., 90.

In *Garvey vs. Refractories Co.*, 213 Pa., 117, a tract of ground was laid out in lots, streets and alleys. The defendant, by various purchases, became the owner of all the lots on the plan save three to which the plaintiff held title. The defendant company constructed its factory buildings over and across some of the streets and alleys. The fact that the defendant company owned lots on both sides of the street gave it no right to obstruct and destroy the street, and so leave it that the plaintiff could no longer use it.

This case covers all the questions that can be raised in the issues now before us. It shows that the Academy must restore the street eliminated, just as the defendant in the *Garvey* case was compelled to remove an extensive factory plant from the streets it encumbered with its improvements.

Where a reservation, covenant or grant is made by the original owners for the common benefit of all the lot purchasers, each holder of a lot is in duty bound to observe, protect, and carry out the terms of the reservation or covenant, for the benefit of the other lot owners; *Clark vs. Martin*, 40 Pa., 297. Even the original grantor can not release a lot owner from complying with such duty; *Smyth vs. Mc. Carroll*, 36 Montg. Law Rep., 227, and cases there cited.

Equity takes jurisdiction and will by injunction restore the street for the use of the plaintiff; *Bowers vs. Myers*, 237 Pa., 533; *Garvey vs. Refractories*, 213 Pa., 177.

The defendant corporation owns the fee of the land on which this east arm is located, and we are not prepared to

Monaghan vs. Academy P. E. Church, Phila.

hold that the grades of said street can not be changed, but there can be no substantial interference with the street as a passage-way; Library Co. vs. Fidelity Trust Co., 235 Pa., 5. The street, however, must remain on the side lines given to it under the dedication and grants. Its course must remain unchanged.

CONCLUSIONS OF LAW.

1. The equity court has jurisdiction to hear and determine the rights of the parties under the issues before us and to enter the appropriate decree.

2. The plan upon the records of the Recorder's office and the designation and location of the two streets in the deed to the plaintiff, in the deeds to the defendant and to its grantors require that the two streets in question should remain open for all time in their entirety for the use of all the owners and occupiers of the lots in the plan abutting on said streets. The defendant had no right to cut off, destroy and eliminate any part of the east arm of the street upon which lots 6, 9 and 10 abut.

3. The special grants and covenants in the said deeds in like manner require that these streets shall be kept open as aforesaid.

4. The plaintiff is entitled to an injunction mandatory in its effect, commanding the said defendant to restore the said east arm of the street, so far as it was cut off, destroyed and eliminated by the defendant. The street must be restored on its old existing lines and be reconstructed for the use of the plaintiff and all other abutting owners on the said street.

The reconstructed street must offer no substantial interference to the plaintiff's passageway over the same.

5. The defendant corporation should pay the costs of this proceeding.

And now, November 26, 1921, the foregoing findings of facts and conclusions of law are filed in the office of the Prothonotary, who will forthwith notify the parties or their counsel of such filing. He will enter a decree *nisi* in accordance with our fourth conclusion of law, and if no exceptions are filed, as required by the Equity Rules, he will enter a final decree, accordingly, as of course.

In the Court of Common Pleas of Montgomery County

**Stern et al., trading as Lincoln Auto Company, vs.
Roberto et al.**

Plaintiffs issued a writ of replevin to recover an automobile leased to defendant A., and in the custody of defendant B. Defendant B. filed its affidavit of defense claiming that it was holding the car for work done on the same. Where a workman does work on personal property and increases its value he has a lien on the chattel for the work so done, provided it has been done at the request of the owner. In this case the repairs were not made at the request of the plaintiffs, therefore the plaintiffs are entitled to judgment.

No. 10, November Term, 1921.

Replevin.

Rule for judgment for want of sufficient affidavit of defense.

Henry I. Fox, Attorney for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Miller, J., May 19, 1922.

The plaintiffs, on September 10, 1921, leased a used automobile for a term of 52 weeks to the defendant, Roberto, who agreed to surrender up the same to its owner upon default or at the expiration of the lease in as good condition as when he took the same, natural wear excepted. He also covenanted that no repairs should be made to the car without the written consent of the lessor first had and obtained.

The defendant having defaulted in the payment of rental, the plaintiffs caused a writ of replevin to be issued and joined the Keasby and Mattison Company as a defendant because the automobile was found in its possession. It had made certain repairs to it at the instance of the defendant, Roberto, and as the bill remained unpaid, it claimed to have a common law lien upon the car. To sustain its position, it avers that each and every repair made inured to the benefit of the plaintiffs by increasing the value of the car, was extraordinary in character and was not such as was caused by the acts or neglect of the lessee, or might be considered ordinary and incidental to the thing bailed. It is interesting to observe that some of the items of its bill antedate the lease and many more have nothing to do with the repair of the car.

So far as this defense is concerned, it is necessary only to refer to the recent cases of *Stern v. Sica*, 66 Pa. Sup. Ct., 84, and *Bankers' Com. Sec. Co., Inc., v. Brennan and Levy*, 75 Pa.

Stern et al. vs. Roberto et al.

Sup. Ct., 199, which are decisive against the company as between it and the plaintiffs.

There is, however, another aspect of the case which requires brief comment. *Meyers & Bro. v. Bratespiece*, 174 Pa., 119, is our authority for the principle that "whenever a workman or artisan by his labor or skill increases the value of personal property placed in his possession to be improved he has a lien upon it for his proper charges until paid, but in order to charge a chattel with this lien, the labor for which the lien is claimed must have been done at the request of the owner or under circumstances from which his assent can be reasonably implied. It does not extend to one not in privity with the owner."

Here, of course, the repairs were not made at the request of the plaintiffs,—in fact, it is not even averred that they either knew of, or consented to them.

Are there, therefore, any circumstances in the case from which plaintiffs' assent to the work being done can be reasonably implied?

We have already mentioned the relevant covenant in the lease and can find set up in the affidavit no averment of fact, as distinguished from an erroneous conclusion of law, from which such assent can be implied. The use of the car cannot be made the foundation for authority to subject the property to a lien; there should be more definite evidence of authority coming from the owner. It may arise by implication but the facts from which the inference is to be drawn should be such as to reasonably lead to but one conclusion: *Stern v. Sica*, *appel.*, *supra*. There was no privity, either express or implied, between the Company and plaintiffs who are, therefore, entitled to judgment.

The defenses of variance in name and failure of plaintiffs to register in Montgomery County were abandoned at the argument.

And now, 19th May, 1922, rule absolute.

In the Court of Common Pleas of Montgomery County.**Hoffman vs. Souder.**

Plaintiff brought suit on a promissory note made by defendant, which note defendant alleges was in payment of stock in a corporation incorporated under the laws of the State of Delaware, of which corporation plaintiff was president. He also claims that he purchased said stock upon the representation that it was a large and successful concern, and doing a profitable business, and that it would pay good dividends. Plaintiff made a motion for judgment for want of sufficient affidavit of defense. The defendant had rescinded his contract of purchase when the note became due. The plaintiff claims the rescission was too late, but under the facts the defendant may have been justified in waiting until the dividend period was supposed to have passed by before rescinding his contract, because the representations which he alleges were made, therefore, the rule for judgment must be discharged.

No. 192, November Term, 1921.

Rule for judgment for want of a sufficient affidavit of defense.

Darlington Hoopes, Attorney for Plaintiff.

W. F. Dannehower, Attorney for Defendant.

Opinion by Swartz, P. J., May 11, 1922.

The plaintiff brought suit, in his own name, on a promissory note made by the defendant to the order of the plaintiff. The note bears date, October 21, 1921, and was payable at three months.

The defendant alleges that he gave the said note in payment of ten shares of stock in the D. R. Hoffman Tire & Rubber Company, a corporation, under the laws of the State of Delaware.

He also swears that the ten shares were part of 4,000 authorized to be issued by the company, and that they were without any nominal or par value.

The certificate shows that the defendant is the holder of the ten shares of the D. R. Hoffman Tire & Rubber Company.

The question may arise how D. R. Hoffman, the president of the said Company, could sell these shares of treasury stock and take the note in his own name. He claims in his statement that he is still the holder of the said note.

There is nothing to show how the president of the company became the owner of this treasury stock, or why the proceeds of the sale should go into his individual pocket.

It may indicate that the plaintiff is the promoter of an individual enterprise under the guise of a foreign corporation.

Hoffman vs. Souder.

The defendant contends, in his affidavit, that he was induced to buy the shares of stock, through the fraudulent representation of the said D. R. Hoffman, the president of the said corporation.

The latter represented, according to the affidavit, that the said company was (1) a large, prosperous and successful concern; (2) doing an extensive and profitable business; (3) that the capital stock was very valuable and that the defendant would surely realize dividends of eight per centum, the first of which would begin on July 1, 1921, dating back from the purchase.

The defendant avers, that the company was not a large, prosperous and successful concern, but was doing a small business that was neither prosperous nor profitable; that the stock was not valuable and paid no dividends.

The false statements which induced the purchase of the shares, to avail the defendant, must relate to material facts affecting the value of the stock. Affirmations of matters resting in opinion are not sufficient to relieve the buyer.

The assertion that the company was conducting a large, prosperous and successful business relates to matters affecting the value of the stock. The same is true as to the value of the stock, and as to the assertion that the business of the company was extensive and profitable.

That the defendant would surely receive a dividend on January 1, 1922, is an opinion as to expectancy. However, the failure to realize such dividend is in corroboration of the defendant's assertion, that the plaintiff's statement was false when he declared that the company was doing a large, prosperous, extensive, successful and profitable business.

It is claimed that the rescission comes too late. We think this is a question of fact for a jury. The defendant may have delayed because a dividend awarded in January, 1922, might convince him that he was in error in his investigations as to the character of the business transacted by the company.

The plaintiff at the trial may be able to show that the transaction was free from any false representations, but there are so many promoters of companies having no sub-

Johnson vs. Shrawder.

stantial assets, that purchasers of stock should be protected, where it appears they were deceived by false statements calculated to catch the too confident buyers.

We are not convinced that the plaintiff is so clearly entitled to judgment that the rule should be made absolute.

And now, May 11, 1922, the rule for judgment is discharged.

In the Court of Common Pleas of Montgomery County.

Johnson vs. Shrawder.

Plaintiff bought certain real estate upon which defendant lived, at an Orphans' Court sale, and defendant entered into a parole contract to purchase the same. Defendant failed to comply with the terms of the agreement and plaintiff, after serving a notice to quit brought his action in ejectment, to which rule defendant filed his answer, setting forth his offer to comply with agreement after 5 years had elapsed and alleging that a trust relationship existed between the parties.

Where no time is mentioned in a contract the law declares compliance must be had within a reasonable time and a period of five years is not a reasonable time, and plaintiff has a right to rescind, and in order to establish resulting trust fraud must be shown by which plaintiff acquired title, such fraud or payment of purchase money must take place when title is acquired, therefore, plaintiff is entitled to judgment.

No. 111, November Term, 1921.

Ejectment.

Rule for judgment.

J. Stroud Weber, Attorney for Plaintiff.

E. F. Slough, Attorney for Defendant.

Opinion by Swartz, P. J., May 8th, 1922.

The plaintiffs claim to be the owners of a property situate in the borough of North Wales. The defendant is in possession of the same.

They brought ejectment and defendant filed his answer and pleadings. The plaintiffs contend that they are entitled to judgment, in their favor, on the pleadings before the Court.

The property in question was sold at an Orphans' Court sale held on March 14, 1917. Prior to the sale the plaintiffs agreed to assist the defendant in the purchase of the property. He declined because unable to furnish any money. The plaintiffs then informed him that they would buy for themselves. The property was struck off to them at the Orphans'

Johnson vs. Shrawder.

Court sale. The price was three hundred dollars subject to an existing mortgage of \$1400. They paid the down money. After the sale they informed the defendant, that if he would pay to them all the money expended in the purchase and raise all the money necessary to complete the sale they would have the deed made to him.

The plaintiffs delayed in paying the entire purchase money to enable the defendant to raise the funds he agreed to furnish to secure the title for himself. This delay continued until June 23, 1917, when the plaintiffs paid the balance of the purchase money and took title in their names. During all this delay the defendant failed to raise or pay a single dollar toward the purchase.

Plaintiffs paid off the existing mortgage of \$1400 and made their own mortgage for \$1300. They had a note discounted in bank for \$525, and thereby paid the entire purchase money.

After the plaintiffs received the title they again agreed to convey to the defendant if he would make them whole for all expenses incurred in their purchase.

All these promises to convey title to the defendant were in parole.

The defendant in his pleadings sets out the parole agreement as follows:

"That the property was to be put in the name of the plaintiffs; that the defendant was to have possession of the premises, make all necessary repairs, pay all taxes, the interest on the mortgage, the interest on the \$525 note, and as soon as he was able to pay off said note the plaintiffs were to deed the property to him."

The defendant declares that he had possession from the day of the sale.

The plaintiffs claim that the possession was not taken in pursuance of the parole agreement, that it existed at the time of the Orphans' Court sale, but upon this motion for judgment we shall assume that possession was given under the parole agreement.

The defendant did not pay off the note of \$525. He did not keep his agreement to pay the taxes. The plaintiffs were compelled to pay them from time to time but were re-

imbursed, according to the defendant's answer. The repayments, however, were very dilatory and required many demands and threats. These failures to comply with the parole contract continued from year to year, giving the plaintiffs much trouble and annoyance without one dollar of compensation.

No rent was paid by the defendant. Finally, on April 12, 1921, after giving the defendant four years to comply with the parole agreement, he was notified in writing to vacate the premises, on or before July 12, 1921.

The defendant alleges that he notified the plaintiffs to appear, in the office of their counsel, Norristown, on September 24, 1921, for a settlement. The plaintiffs did not appear and the defendant alleges that he made a tender to their counsel of the money due and demanded the execution of the deed. There was no tender to the plaintiffs nor is it alleged that counsel had any authority to accept or refuse such tender, if made.

The notice to vacate was absolute and gave the defendant no privilege to pay on or before the day fixed for the vacation. It was a rescission of the parole agreement.

The Orphans' Court sale was a judicial sale and it is not alleged that the plaintiffs or defendant had any interest in the property.

The ejectment was brought on December 29th, 1921, nearly five years after the parole agreement had its inception.

The defendant paid twenty-five dollars to the plaintiffs on the said note of \$525. The date of payment is not given but it was a considerable time after the sale and after the title was made to the plaintiffs.

Two letters were written to the defendant by the plaintiff, J. Howard Johnson. They are dunning letters, complaining about the non-payment of the taxes by the defendant and demanding a reimbursement for the taxes the plaintiffs had been compelled to pay. These letters do not identify the property, nor do they, in any way, define the terms of any contract.

There is no allegation of any improvements made on the premises by the defendant. There is no damage that he will

Johnson vs. Shrawder.

suffer if he must quit. He enjoyed the use of a house and lot for five years without the payment of any rent other than taxes and the interest on the mortgage and note. Twenty-five dollars on account of the note is the extent of his outlay. He enjoyed all the benefits under the parole contract and the plaintiffs received no return for the use, wear and tear of their house.

There is no evidence whatever to support a resulting trust. No money was contributed to buy the property, nor was there any fraud on the part of the plaintiffs. There was no confidential relation and the defendant was not deceived by anything that was said or done by the plaintiffs. It is not shown that he or others were induced to refrain from bidding on the property.

As there was no fraud, at the time of the sale, subsequent refusal to convey does not constitute fraud to support a resulting trust or a trust *ex maleficio*.

It is not alleged that either party had any interest in the property before or at the time the Orphans' Court sale was held.

"A resulting trust can only arise from some fraudulent act by or through which the title had been obtained or by the payment of the money of the alleged use party for the purchase of the property, at the time the conveyance is made and that neither subsequent fraud nor subsequent payment will avail to raise such a trust"; *Salter vs. Bird*, 103 Pa., 436; *McCloskey vs. McCloskey*, 205 Pa., 491; *Kraft vs. Smith*, 117 Pa., 183. The subsequent payment of the paltry sum of twenty-five dollars and the reimbursement of a few dollars of expenses incurred by the plaintiffs will not raise a resulting trust.

"A resulting trust, however, is raised only from fraud in obtaining the title, or from the payment of the purchase money when the title is acquired. Payment of the purchase money subsequently is not sufficient to raise a legal implication of a trust, as all the authorities show." *Bryan vs. Douds*, 213 Pa., 221.

The violation of the purchaser at Sheriff's sale, of a parole agreement, that he would buy for another, a stranger to the title but occupying the property and to convey the

Johnson vs. Shrawder.

lands to the latter upon the payment of the purchase money will not create a trust *ex maleficio*, in favor of the promisee. The subsequent payment of taxes and ordinary repairs tends only to establish the parole agreement, but not that there was fraud when it was made; Shaffner vs. Shaffner, 145 Pa., 163.

Even where a small amount of the purchase money was paid by the promisee, at the time the promisor bought, was held not sufficient to raise a resulting trust; Parry vs. Miller, 247 Pa., 51.

It follows that the defendant has nothing in support of his claim other than his naked parole agreement to convey. He made no improvements and the purchase money was never paid.

Possession without payment of the purchase money or valuable improvements that can not be compensated in damages will not support the defendant's claim of title. There is no allegation of any improvements.

In Parry vs. Miller, *supra*, some purchase money was paid at the time of the sale, outbuildings were erected under the possession taken and all the purchase money was subsequently paid according to the finding of the jury, and yet the Court held that it was a close case, not free from difficulties, and with some hesitation the verdict of the jury in favor of the parole promisee, was sustained.

The parole contract must be so far executed by the vendee that it would be a fraud upon him to refuse a conveyance. Greenlee vs. Greenlee, 22 Pa., 225. There must be such partial performance, including the taking of possession, as would make it unjust and inequitable not to execute the contract; Reno vs. Ross, 120 Pa., 49. We can find no such equitable rights in favor of the defendant. A chancellor can not say that under the pleadings it would be unjust to deny the equitable enforcement of the contract. If this defendant, under the pleadings, is entitled to a deed, then the Statute of Frauds can be easily circumvented. The defendant fails to allege any loss or disadvantage if a deed is denied to him.

The equities are with the plaintiffs. If the defendant can delay for nearly five years before he concludes to take title then he can take advantage of any increase in the value

Johnson vs. Shrawder.

of the property or leave it in the hands of the vendor if such value should decline.

The letters recited in the defendant's pleadings do not help his claim. As already stated, these letters do not describe or define the property, nor do they give the terms of any contract. "The written evidence of the contract signed by the party holding the legal title should contain, within itself, all that is necessary to enable a chancellor to declare the trust and make a decree in favor of the beneficiaries. Oral evidence can not be introduced to supply any link in the chain of testimony; " Dyer's Appeal, 107 Pa., 446.

But if we are in error and the defendant had a right to demand a deed, he forfeited his claim by the delay in complying with his terms of the contract. It is well established that where no time limit is fixed for the conveyance, the law declares that compliance must be made by the vendee within a reasonable time. After the patience of the plaintiffs for nearly five years, they certainly had a right to rescind the contract.

The notice to vacate was given on April 12, 1921, more than four years after the plaintiffs bought the property. It was not until September 24, 1921, that the defendant made his alleged ineffectual tender. "The party seeking specific performance must show affirmatively, that he has been in no default, which cannot be explained or excused and that he has taken all proper steps towards the performance on his own part, for mutuality is of the essence of all contracts and indispensable to move the conscience of a chancellor"; Greenlee vs. Greenlee, 22 Pa., 235.

Tested by this rule the defendant is wholly without any equity to maintain title to the property.

And now May 8, 1922, judgment is entered in favor of the plaintiffs and against the defendant on pleadings before the Court, for the premises described in the writ to the Sheriff.

In the Orphans' Court of Montgomery County.**Estate of Amelia R. L. Weaver, deceased.**

Decedent died leaving a Will in which she appointed her surviving husband, and Penn Trust Company executors, and directed after the death of her husband who had a life estate, the distribution of the estate to various parties among which was a direction that the trustee should set aside five thousand dollars, and the income therefrom to be paid to the trustees of the Lutheran Theological Seminary of Philadelphia to be used either for preparation for young men of the ministry or perpetual foundation of two scholarships.

Counsel for the seminary contended that the trust was a dry one, that therefore the fund should be awarded to the seminary rather than to the surviving trustee. There is a duty imposed upon the surviving trustee to invest the fund and to see that the trustees of the seminary applied the income from said fund in the ways as directed by the testatrix, in which case they do have a duty to perform, and the trust is not a dry, but an active trust, therefore the award is made to the surviving trustees.

No. 38, February Term, 1922.

Adjudication.

William F. Dannehower, Attorney for Accountant.

E. Augustus Miller and Paul Van Reed Miller, Attorneys for
Lutheran Theological Seminary.

Opinion by Solly, P. J., March 8, 1922.

Amelia R. L. Weaver, a resident of the Borough of Norristown, died on the 20th day of March, 1919, having made her last will and testament in writing bearing date the 6th day of November, 1918, with codicil thereto bearing date the 25th day of February, 1919, duly probated the 17th day of April, 1919, on which letters testamentary were granted to her surviving husband, Dr. Joseph K. Weaver, and the Penn Trust Company of Norristown, who were appointed executors.

The testatrix had no issue.

In her will after directing the payment of debts, funeral expenses and the direct and collateral inheritance taxes, she gave, devised and bequeathed to her executors the net residue and remainder of her estate in trust, to collect the rents, issues, profits and income, and pay the net proceeds thereof to her husband during his life. The surviving husband died the 1st day of October, 1921. No account was filed in his lifetime.

Attention of the court was called in the petition for distribution that the fee of counsel for the estate is wholly charged against principal and it is suggested that \$100 of the fee should be charged against income. In this instance

Weaver's Estate

nothing appears to move the court to apportion the counsel fee. In our opinion the fee for services of counsel should be charged against the principal of the estate.

As already noted the testatrix bequeathed the residue of her estate to her executor in trust, to pay the net income to her surviving husband during his life. The surviving trustee after the death of the husband is directed to pay to Miss Clara B. Lehman the sum of \$5,000; Sara E. Ermold the sum of \$1,000; and the Children's Aid Society of Norristown, Pa., the sum of \$500. It is to pay to Mrs. Mahlon Bolton, a sister of the testatrix, the net income on the sum of \$5,000 during her life, and at her decease to pay the income to the Home Missionary Board of the General Council of the Evangelical Lutheran Church of North America, through the Women's Missionary Society of Norristown, Pa., conference, to be applied towards training young women for Christian work, according to their discretion; and to pay to Mrs. Clara Simpers, a sister of the testatrix, the net income arising from the sum of \$5,000, during her life, and after her death to pay the income to the United Lutheran Church in America, to be applied toward church extension and in aid of struggling churches; and to pay to Mrs. Ella Ermold the net income on the sum of \$1,000 during her life, and immediately after her decease to pay the principal to her daughter, Sara E. Ermold.

The trustee is to set aside the sum of \$5,000, and the income arising therefrom is to be paid to the Trustees of the Lutheran Theological Seminary of Philadelphia, to be used in their discretion towards the preparation of young men for the ministry, or, if deemed by them advisable, for the perpetual foundation of two scholarships of \$125, each to be known as the "Amelia R. Lehman Weaver Scholarship;" and set aside the sum of \$800, and the income arising therefrom to be paid to the Treasurer of Charity Hospital of Norristown (the corporate name of which is now Montgomery Hospital) for the purpose of furnishing, maintaining and keeping in repair a room in said hospital, to be known as the "Amelia R. Lehman Weaver Room," unless such room shall have been furnished by the testatrix in her lifetime, when and in that event the income shall be applied for

Weaver's Estate

the maintenance, repairing and refurnishing of the room. It was stated at the audit that a room was not furnished by the testatrix in her lifetime.

In a codicil a legacy of \$2,500 is given to the Trustees of the Orphans' Home Asylum for the Aged and Infirm at Germantown, Pa., for the equipment and support of a gymnasium in said home to be called the "Weaver Gymnasium."

The residue of the estate the surviving trustee is directed to pay to Muhlenberg College of Allentown, Pa., in trust, to invest and to apply the net income or so much of the principal as may be deemed advisable by the trustees of said college towards aiding and assisting worthy poor young men selected in the discretion of said trustees, in obtaining college training.

The several persons to whom legacies are given absolutely, or who are to receive the income from special trusts, are living and of full age.

Counsel representing the Trustees of the Lutheran Theological Seminary of Philadelphia claimed that the trust under Item 2, paragraph 11, is a dry or passive one, and that the amount of the legacy should be awarded to said trustees. On the other hand, the surviving trustee claimed the trust to be an active one, and that the legacy should be awarded to it.

The testatrix, after directing the payment of her debts, funeral expenses and the direct and collateral inheritance taxes, gave, devised and bequeathed to her executors all the net residue and remainder of her property, in trust, to collect the rents, issues, profits, interest and income, and to pay the net proceeds to her husband during his life; after the death of the latter, inter alia, to set aside the sum of \$5,000, and to pay the income arising therefrom to the Trustees of the Lutheran Theological Seminary of Philadelphia, to be used in their discretion (that is, the discretion of the seminary trustees) toward the preparation of young men for the ministry, or if deemed by them (seminary trustees) advisable, for a perpetual foundation of two scholarships to be known as the "Amelia R. Lehman Weaver Scholarship." The testatrix created a trust of her whole estate for the life of her husband, who was to receive the income, and at his death

Weaver's Estate

the trust was expressly continued as to parts of the residuary estate. The trustee is directed to pay Mrs. Bolton and Mrs. Simpser the net income of \$5,000 during their lives, and to pay Mrs. Ermold the net income of \$1,000 during her life. To carry out these provisions there must be retained \$11,000 for investment. Then other parts of the estate are continued in trust by the creation of two special trusts. There is set aside \$5,000, the income from which is to be paid to the Trustees of the Lutheran Seminary to be used in the discretion of said trustees for certain purposes; and there is set aside \$800, the income from which is to be paid to the treasurer of the hospital for certain purposes.

It is a familiar principle that one may lawfully do with his property as he wishes so long as he does not violate any law or rule of public policy. The purpose of the testatrix in directing the two above mentioned sums to be set aside and the income from them paid respectively to the trustees of the seminary and the treasurer of the hospital is not disclosed in the will. She may have deemed it wise for good and sufficient reasons to her way of thinking to have the principal of the two trusts managed and invested by the surviving trustee. Perhaps she believed also that the trustee had better facilities for investments and for the care and protection of the funds. We need not speculate as to what her object was, or her motive. She did not give the principal of the trusts to the beneficiaries as she did in giving the residue of her estate to Muhlenberg College. She expressly withheld it. She impliedly imposed upon the trustee the active duty of investing and reinvesting the principal of the two trusts, the collection of the interest or income, and the payment of the same to the trustees of the seminary and the treasurer of the hospital. Her act was entirely lawful and is not in conflict with any rule of public policy. The imposition upon the trustee of active duties involves the exercise of discretion and judgment in the care and management of the trust funds. In *Xander vs. Easton Trust Company*, 217 Pa., 485, 489, it is stated, that it may be taken as settled if there is a testamentary direction to invest the corpus of an estate and pay over the income an active trust is established. Citing *Keene's Est.*, 81 Pa., 133. It is also stated

Weaver's Estate

that the same result follows in bequests of personalty. *Eichelberger's Est.*, 135 Pa., 160. In *Eschbach's Est.*, 197 Pa., 153, 160, where the trustee was given the fund itself and required to place the same out at interest, it was held that the direction to invest (in the case at bar there is an implied direction to invest) included the reinvestment of the fund as often as it become necessary, and that this imposed active duties upon the trustee, and involved the exercise of discretion and judgment in the care and management of the fund. See also *Henderson's Est.*, 258 Pa., 510, 514.

While the testamentary trustee is not charged with the duty of seeing to it that the trustees of the seminary and the treasurer of the hospital do use the income of the two several trusts for the purposes stated by the testatrix in her will, nevertheless if the income is not so applied or used the testamentary trustee can, and should, refuse to pay over the income unless so ordered by the Court. The intention of the testatrix to give to the seminary and the hospital the income only of the trusts, and not the principal, is clear and unmis-takable. Where the manifest intent of a testator is to sever the product from its source a bequest of the income will not carry an absolute estate in the principal. *Bentley vs. Kaufman*, 86 Pa., 99; *Eichelberger's Est.*, 135 Pa., 171. Where a trustee is directed to pay over net income the trust is an active one. *Hemphill's Est.*, 180 Pa., 96.

One of the objects of the testatrix, as evidenced by her Will, was that her testamentary trustee should hold the principal of these two trusts, as well as others, invest the same and pay over the income to be used by the legatee for certain specific purposes. Wherever it is necessary for the accomplishment of any object of the creator of a trust that the legal estate should remain in the trustee, then the trust is a special active one. *Rife vs. Geyer*, 59 Pa., 393; *Moore's Est.*, 198 Pa., 611; *Gourley's Est.*, 238 Pa., 65.

The appeal of *St. Luke's Church*, 1 Walker, 283, is not essentially analagous to the one at bar. In that case the testatrix had devised certain real estate to the Church, and the executors were directed to place out at interest a certain sum to be received out of the net rents of the real estate devised to the Church and apply the income to the repair of

Zeigle vs. Shaver et al.

the real estate. It was held that the trust was a dry one because the trustees could not withhold payment of the annual income and they were without power to lay it out in repairs because they had no right to meddle with the property to be repaired. In the case at bar the income of the seminary trust is to be used either for the preparation of young men for the ministry or for the perpetual foundation of scholarships as the seminary trustees in their discretion shall deem advisable. The testamentary trustee cannot interfere with the discretion exercised by the seminary trustees, but it has the right to withhold the paying of the income to the trustees if it be not applied by the seminary trustees for one of the two purposes stated in the will. In this regard they have a duty to perform.

Being of the opinion that the trust for the seminary is an active one, as well as that for the hospital and the other trusts, awards are accordingly made to the surviving testamentary trustee.

In the Court of Common Pleas of Montgomery County.

Zeigle vs. Shaver et al., State Police.

Plaintiff brought an action of replevin against the defendants to recover an automobile which was seized by defendants as State Officers, and held by them as evidence in the prosecution of one King, who was charged with illegally transporting intoxicating liquors. The defendant filed a motion to quash the writ, alleging that the automobile was in the custody of the law and not subject to replevin. Under the acts covering replevin and under the decisions of other jurisdictions where an officer takes personal property and holds the same for the purpose of evidence, the same is not subject to a writ of replevin, therefore the writ must be quashed.

No. 145, February Term, 1922.

Replevin.

Joseph S. Kratz, David R. Griffith, Jr., Attorneys for Plaintiff.

Wm. F. Dannehower, Sr. and Jr., Attorneys for Defendants.

Opinion by Miller, J., June 24th, 1922.

Neither counter-affidavit nor answer was filed by plaintiff, who also submitted no depositions. The averments of defendants' affidavit sur motion to quash, supported by their depositions, show that one, King, was arrested by the defend-

Zeigle vs. Shaver et al.

ant, Shaver, and other officers while engaged in an alleged violation of Section 20 of the Act of May 5th, 1921, P. L. 407, in that he was unlawfully transporting intoxicating liquor for beverage purposes. The automobile in which he was riding and certain barrels, found under his control, were brought with him to Norristown and, at the direction of the first assistant District Attorney, deposited by the police in the prison yard, where they still remain, to be used as evidence against him at the trial. He has not yet been tried because, after being admitted to bail for further hearing by the justice of the peace, he failed to appear. The police still insist upon holding the articles mentioned for the purpose stated.

The plaintiff, claiming to be the owner of the automobile, sued out this writ of replevin and it was served by the sheriff on Corporal Shaver and the warden of the prison.

On the day following such service, a motion to quash was filed and this rule was obtained—defendants contending that the automobile is in the custody of the law and not subject to replevin.

The pertinent legislation is to be found in the Act of April 3, 1779, 1 Sm. L., 470, Section 2, which provides that "All writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized, or taken in execution, or by distress, or otherwise, by any sheriff * * * or other officer, acting in their several offices, under the authority of the state, are irregular, erroneous and void, and all such writs may and shall, at any time after the service, be quashed (upon motion) by the Court to which they are returnable, the said Court being ascertained of the truth of the fact, by affidavit or otherwise"; and Section 3 which gives treble costs to the defendant or defendants in such writs.

This act, being remedial, is to be construed liberally: *Pott vs. Oldwine*, 7 Watts, 173; *Cunningham*, *appel.*, vs. *Wilmerding Boro.*, 38 Pa. Sup. Ct., 20, 23. It requires only that the record should be self-sustaining (*Seanor*, *appel.*, vs. *Fitt*, *et al.*, 263 Pa., 391); but it must appear that the goods when replevined were in the possession, custody, or control of the officer: *Weed vs. Hill*, 2 Miles, 122.

A motion to quash under the act is much more far-reaching than ordinarily. It is not confined to cases of irregularity

Zeigle vs. Shaver et al.

appearing on the face of the writ, but, even under the Act of 1779, where the facts, or the law arising on the facts, is doubtful, a prudent judge would refuse to quash on an affidavit and would leave the party to his plea: *Shaw vs. Levy*, 17 S. & R., 99.

That the automobile in question was taken or seized for evidential purposes by an officer of the state constabulary acting in his office when making an arrest, is established by the affidavit and depositions. It was not, of course, taken in execution or by distress, but the words "or otherwise," as used in the act, are, in our opinion, sufficiently comprehensive to embrace this taking.

The case of *Jones vs. Pavey, et al.*, 10 Pa. D. R., 498, on which counsel for defendants relies to show that it was taken under authority of the state, is not exactly in point, however. There the article, possession of which was sought to be obtained by the writ, was the subject matter of an alleged larceny. Here such is not the case. But there, Judge Evans, in quashing the writ, said in part: "But the magistrate having made no disposition of the ring in this case" (see Act March 31, 1860, P. L., 427, Section 52), "does it follow that the law loses its control over the stolen property, pending the disposition of the criminal charge? We think not. The administration of the criminal court deems that it shall retain control of all evidence tending to throw light on the criminal charge and the arresting officer is the agent of the criminal court in retaining possession of the alleged stolen property until after the close of the prosecution."

The same is true of *Cunningham, appel., vs. Wilmerding Borough*, *supra*, in which, however, Judge Rice said, with his usual clearness: "It is not sufficient that the goods for which the replevin issues were seized by and are in the custody of an officer of the law. He must in seizing and holding them be acting under the authority of the state. If he had no process issued by some court, magistrate or tribunal having jurisdiction to issue such process, he must be able to point to some law or lawful ordinance authorizing him to seize private property without process, and hold it for a particular lawful purpose, and must satisfy the court that he seized and held it for that purpose." In seizing the

property he must be acting within the scope, or apparent scope, of his official power. In that contingency, it may be fairly said that he has complied with the only other requirement of the law—he was acting “under the authority of the state.” Was such the case here?

The officers, when they took King, carried along what they then believed, and still believe, to be relevant and competent evidence to be used by the commonwealth at his trial. The correctness of that belief, or the difficulty surrounding its introduction, is not now before us. They still hold it in good faith for that purpose. We find no Pennsylvania case directly in point, but that the law elsewhere sustains their action is well settled. The general principle is to be found laid down in 24 A. & E. E. of Law, 505, as follows: “Where property is withheld by police officers as evidence against persons charged with crime, the owner, though not one of the persons charged with violating the law, has been denied the right to regain possession of the property by replevin.”

In the very recent well-considered case of *Good vs. Board of Police Com. of Baltimore, et al.*, 112 Atlantic, 294, in which it was decided that an automobile lawfully taken in possession and held by the board of police commissioners for use as evidence in a criminal prosecution was not subject to replevin by a claimant, this whole subject was learnedly discussed at length. Amongst other cases relied on there was *Getchell vs. Page*, 18 L. R. A. (N. S.) 253, in a note to which it is said that “it is the general rule, upheld by the great majority of the cases upon the subject, that a peace officer, while executing a criminal process, may take possession of articles for the purpose of evidence, and hold them for such purpose; and the officer will not be liable for trespass in so doing, nor is the owner entitled to recover possession thereof.”

The opinion in the *Good* case also quotes the following language with approval: “It is not only the common practice, but the requirement of the common law, that articles which may supply evidence of guilt of a party accused, found in his possession or under his control, may be taken in possession of the officer officiating in making the arrest; and,

Zeigle vs. Shaver et al.

indeed, it is the duty of such officer to take into his possession and retain such articles, subject to the power and direction of the court or justice having cognizance of the alleged crime. This principle is one of necessity in the administration of the criminal law, and it is generally recognized by the courts of the country with few, if any, exceptions."

It is by virtue of this time-honored principle that an officer arresting one for violating the statute prohibiting the carrying of a deadly weapon concealed upon the person, or committing any other crime in the commission of which a weapon has been used, invariably seizes the weapon, if such is possible, to be used as evidence at the trial; and that the still is seized for the same purpose in cases involving a violation of the Woner act by unlawfully manufacturing intoxicating liquor for beverage purposes. Instances showing exercise of the police power in this regard might be multiplied indefinitely.

The criminal authority having jurisdiction may, doubtless, control its exercise and relieve the wronged party in case of oppression, but there is no such application now before us. This is an ordinary replevin in the Common Pleas and there is nothing set up by the plaintiff to take the case out of the general rule. The automobile in question was properly seized by a member of the state constabulary while acting in his office under the authority of the state and we are satisfied that it is being lawfully held for use as evidence at the trial of King on the charge of illegally transporting intoxicating liquor for beverage purposes. It relates directly to this charge. Replevin for it does not, therefore, lie and the writ is irregular, erroneous and void. It may be that, soon as the defendants become reasonably satisfied that there is no prospect of an early trial of King, or that the commonwealth will not require the car for use as evidence at such trial, they will release it, but there is nothing before us at this time that would support an order in the Quarter Sessions compelling them to do so. See, generally, notes 11 A. L. R., 681, and 13 A. L. R., 1168.

And now, 24th June, 1922, rule absolute, writ quashed and defendants are awarded treble costs.

In the Court of Common Pleas of Montgomery County.**DeAngelis vs. American Railway Express Co.**

Plaintiff shipped by express a box and a bundle, and received a receipt for the packages, upon which was printed in case of loss, "claims must be made in writing to the originating or delivery carrier within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

The question raised was whether the plaintiff notified the defendant in writing within the four months after a reasonable time after delivery had elapsed, because five months and six days had elapsed from the time of shipment. The articles were shipped outside of the State, and therefore, governed by federal law.

As the box was delivered within five days, one month and six days would not be a reasonable time, and the defendant did nothing which would act as a waiver of his rights, as contained on the receipt, and as such is the case judgment must be for the defendant.

No. 56, February Term, 1921.

G. R. Fox, Attorney for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Miller, J., June 24th, 1922.

This case appeared on the last civil trial list when, upon its being reached, it was disclosed that none of its material facts was in dispute. It was, therefore, arranged that it should be submitted to the court for decision by an agreement in the nature of a case stated. Such has been done and we have heard argument.

The plaintiff, on January 20th, 1920, delivered to the defendant, a common carrier, at Norristown, Pa., a box and a bundle, consigned to Maria DeAngelis, Hoffman Island, Rose Bank, N. J., and prepaid the charges. The box reached the consignee sometime between the 23rd and 25th of the same month, but the bundle, which contained clothing of the value of more than fifty dollars, was never delivered to her.

The defendant issued to the plaintiff a written receipt for the packages when they came into its possession, one of the conditions of which read, in part, as follows: "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

DeAngelis vs. Express Co.

Within a few days after the date of shipment, the plaintiff called on the agent of defendant at Norristown and "advised" him that the bundle had not been delivered at destination. He was directed to call later and informed that, in the meantime, the package would be traced. He called several times thereafter and "was each time advised to call again and they might have some information as to what had become of the bundle." Eventually and on June 26, 1920, as the missing bundle had not been located, the plaintiff notified the defendant in writing at Norristown of its failure to make delivery and made claim for the same. This constituted his first and only claim for the loss. Suit for recovery was subsequently brought.

It appears by the foregoing statement that claim in writing in this case was not made until five months and six days after shipment. The contract required such claim to have been made within four months after a reasonable time for delivery had elapsed. If it was made in time, then one month and six days must be found to have been a reasonable time for delivery. The only question for determination is, therefore: What, under the facts before us, was a reasonable time for such delivery?

This was, of course, an interstate shipment: the question stated is governed by Federal law (Robb vs. Am. Ry. Ex. Co., *appel.*, 78 Pa. Sup. Ct., 1, 7); and the stipulation in the contract requiring notice of claim was valid and reasonable (see 8 U. S. Comp. Statutes 9307 and cases cited).

Whether one month and six days is "a reasonable time for delivery" in transportation by express carrying trains between Norristown, Pa., and Rose Bank, N. J., is a question about which there cannot be the slightest doubt. The box was delivered within five days. That not more than a week would have been sufficient is so clearly manifest as to leave no room for two different and intelligent opinions. "In all such cases, the function of the jury may be dispensed with and the question disposed of by the court as one of law. * * * Reasonableness of time for performance of an act of any kind is governed by the general rule as to the functions of court and jury. The question is often one for the court * * * ." Kahn vs. American Railway Ex-

DeAngelis vs. Express Co.

press Co. (W. Va.), 106 S. E., 126; Elk Textile Co. vs. Cohen, appel., 75 Pa. Sup. Ct., 478. Moreover, the plaintiff knew "within a few days" after January 20th, that the bundle had not arrived. Notwithstanding, he delayed for practically five months thereafter to present his claim, and, by the terms of his contract, it was then too late.

The facts relied upon as constituting waiver by the defendant are manifestly insufficient. When complaint of the loss was first made, its agent advised the plaintiff to call again and promised to have the package traced in the meantime. When he returned he was invited to come back when it was probable there would be some information of the bundle. There was no promise at any time to adjust or pay the claim and, in fact, no claim was made until June 26th.

As in Kahn vs. American R. W. Express Co., supra, there is no fact in the case that can be deemed to have wrought a waiver.

But even did the facts constitute a waiver, it would have been inoperative. Under the Federal decisions the carrier can no more release the shipper from such a stipulation as to notice, than it can excuse him from payment of the established rate: Concordia Silk Hosiery Co. vs. Penna. R. R. Co., appel., 69 Pa. Sup. Ct., 361; Scattergood vs. Michigan Central Railroad Co., appel., 69 Pa. Sup. Ct., 367. Its effect would be discrimination as between shippers, the avoidance of which is part of the object of the federal legislation under which these bills of lading are formulated.

Therefore the denial of the possibility of a waiver extends as well to a direct and express one, as to an inferential one from conduct. Williston Grocery Co., to use, vs. Penna. R. R. Co., 12 Berks Co. L. J., 23.

As the stipulated requirement as to notice of claim was not, and could not have been, waived by the defendant, and such claim was not made in writing within four months after a reasonable time for delivery of the bundle had elapsed, the plaintiff is not entitled to recover.

And now, 24th June, 1922, judgment is entered for American Railway Express Company, defendant.

In the Court of Common Pleas of Montgomery County.**In the Matter of the Application to Remove from Office the
School Directors of the Township of Montgomery.**

Plaintiff filed a petition under Section 217 of the School Code of 1911 to remove the school directors from office, because of alleged refusal and neglect to perform their duties.

The defendants filed their answer to said petition alleging that they were taking all the steps possible to correct the difficulty. And it is clearly within the discretion of the school board to remodel old buildings to comply with the law or to have consolidated schools, and the Court cannot direct what should be done, and in addition the evidence disclosed that one of the petitioners was very active in trying to hinder the board in floating a loan for consolidated schools. The petition is, therefore, dismissed.

No. 20, April Term, 1922.

Hearing on bill, answer and proof.

L. Albert Gray, Attorney for Petitioners.

Samuel D. Conner, Attorney for School Directors.

Opinion by Swartz, P. J., June 21, 1922.

This is an application under Section 217 of the School Code of 1911, to remove the School Directors from office, because of their alleged refusal and neglect to perform the duties imposed upon them by law.

The petitioners declare,—that the School Board has failed to provide and equip a sufficient number of school houses or elementary schools to meet the needs of the children of the township; that the buildings used are not in proper repair and that the Department of Public Instruction so notified the Board; that the said School Directors resolved to consolidate the schools and erect a suitable building, but were dilatory in obtaining estimates of the cost of such building; that the proposed bond issue to provide funds to erect the consolidated school building was delayed and not submitted to the voters of the township until May 16, 1922; and lastly that the bond issue of \$30,000 proposed by the directors was excessive.

They answer that they made some repairs, but only such as were necessary, in view of abandoning the old buildings for the new house to be erected, as a consolidated school.

They admit that a number of the pupils of the township attend the schools in the borough of Lansdale and other schools in the surrounding township.

In re School Directors of Montgomery Township.

They deny that they were dilatory in taking steps to erect a building to be used for the consolidated schools. They allege that they obtained plans, employed an architect and obtained estimates showing the costs of a proper consolidated school building. They declare that they followed the plans and suggestions received from the State Department of Public Instruction.

They also answer that a consolidated school building would cost \$27,000, according to the estimates received, and that such estimate does not include the furnishings of the building or the cost of the lot and ground to be used for the new structure.

To meet such an expenditure the directors declare that they have on hand, cash \$1050, and that the old school house if sold would not bring more than about \$1800.

They answer also, that the proposed loan was defeated, at the May election, and that they will resort to some measures to build a consolidated school or repair the old buildings to comply with all the requirements of the law.

The directors might have added in their answer that one of the petitioners to remove the Board was very active in persuading the voters, by argument, and newspaper articles, to defeat the proposed loan.

All the petitioners in their application for the removal of the directors united in declaring that the proposed loan was excessive and without proper authority from the School Board.

It is not surprising that the loan was defeated. We are convinced that a loan of \$30,000 would not be excessive.

There is some difficulty in meeting the school needs, in a township like Montgomery. The territory is large for the number of pupils requiring school accommodations. The township is sparsely settled and its growth, in population, is practically at a stand-still.

The assessed value of property is not large enough to raise a sufficient school fund by a moderate tax rate. The people allowed their schools to drift along, until their condition is below the standard in this county in efficiency, both as to buildings and school facilities. The crisis is at hand, when the directors must take more advanced and progressive

In re School Directors of Montgomery Township.

steps. The fault, no doubt, is not alone with the directors. If the people want better school facilities they will elect directors who will furnish them.

The answer of the directors gives us the facts as they actually exist. We are convinced that they are making an honest effort to comply with the law. Their actions, as disclosed by the evidence, establish this fact.

Their efforts to establish a consolidated school, seems to us, a movement in the right direction. Why the Court should be requested at this time to remove them from office when they are trying to remedy the existing unsatisfactory conditions, we cannot understand.

The directors before us, in obtaining plans and estimates, and in their endeavor to secure funds to build a consolidated school house, show that they mean to discharge the duties imposed upon them. If they cannot obtain the money for a consolidated school building, they will improve and repair the existing houses, at a cost of about \$6,000 or \$7,000. Whether they should improve the old houses or erect a consolidated school is a matter in the discretion of the directors. The Court cannot exercise control over the exercise of such discretion: *Gilfillan vs. Fife*, 266 Pa., 171; *Jones vs. Boulter*, 61 Pa. Superior Ct., 73.

As already stated, the consolidated school plan is feasible while the repairs and improvements of the old buildings will not give relief from the serious condition that now prevails, whereby a large portion of the taxes raised in the township is paid to outside districts for the education of the children residing in Montgomery Township.

To deprive a man of his office is a drastic procedure and should not be invoked unless there is a clear proof that he refuses and neglects to discharge the duties imposed upon him.

Perhaps the directors have not exhausted their efforts to raise, by legal procedure, the funds needed for a consolidated school building.

We find no sufficient ground for the filing of this application, and therefore the costs should be paid by the petitioners.

Should the directors discontinue their present activities to improve the school facilities of the township a new and,

Arbuckle-Gordon Co. vs. Winkler Estate.

no doubt, meritorious application for their removal can then be presented.

And now, June 21, 1922, the application is dismissed, the costs to be paid by the petitioners.

In the Court of Common Pleas of Montgomery County.

Arbuckle-Gordon Company vs. Estate of Bertha A. Winkler

Plaintiff filed a mechanic lien against the estate of defendant and the executors and trustees of the estate.

The defendant then filed a motion and rule to show cause why the lien should not be stricken from the records, alleging that the lien cannot be maintained, because the property against which it was filed was owned by the trustees, and also alleging that the lien was not filed in time.

Under the amendment as filed the contract was made by the decedent in her lifetime, and unless the representatives of decedent give positive notice to discontinue the work, they have the right to continue in their contract, and therefore the lien is valid as against the representative of decedent.

Whether the lien was filed in time or not is the question for the jury as to whether the last item furnished was part of the contract work.

No. 9, June Term, 1921.

Mechanic's Lien, rule to strike off.

H. Wilson Stahlnecker, Attorney for Plaintiff.

Albert W. Sanson and Theodore Lane Bean, Attorneys for Defendant.

Opinion by Swartz, P. J., July 1, 1922.

The reasons filed in support of the motion to strike off the lien are numerous, but fall within two classes.

It is contended that the lien can not be maintained because the property against which it is filed is held by a trustee, and because the contract for the improvements was not made under the authority of the Court.

The other reasons raise the questions whether the lien was filed in time, and whether the notice of the intention to file a lien was given in time.

The second section of the Act of June 4, 1901, P. L. 431, declares: "No lien shall be allowed for labor or materials furnished, against any property held by a committee of a lunatic, the guardian of a minor or a trustee under deed, will or appointment by the Court, unless by virtue of a contract made under authority of the Court or of the power contained in the deed or will."

The agreement for the work, labor and materials to be furnished was made between Bertha A. Winkler and John H.

Arbuckle-Gordon Co. vs. Winkler Estate.

McCloskey, the contractor, on June 13, 1920. Mrs. Winkler died. Under her will, the parties named as defendants in the lien filed became the executors and trustees of her property.

Mrs. Winkler was the owner of the building upon which the improvements were to be made. The contract with Mr. McCloskey was made in her lifetime. The property was not held by any trustee when Mrs. Winkler made her agreement.

The words of the second section of the said Act of 1901 do not apply to this case.

The trustee must have authority from the Court to contract for the improvement of property held by him.. This property was held by Mrs. Winkler when the contract was made and not by any trustee. The Act does not call upon the trustee to ratify the contract made by the owner in her lifetime.

The agreement made by Mrs. Winkler, according to its terms, was binding upon her heirs, administrators, executors and assigns.

The Act means that if a trustee holds real estate under his trust and desires to make a contract for its improvement, he must first have the authority of the Court: *Fisher Foundry Co. vs. Susquehanna Steel Co.*, 20 Lancaster Law Rep., 292.

A contractor may expend a large sum of money in building a house. If the owner dies before it is finished, the contractor, if he is not entitled to file a lien, may be postponed by subsequent encumbrances entered in the lifetime of the owner, and thereby lose all his money.

The amendment of the lien allowed by the Court, under the agreement of the defendants, shows that the contract was made with Mrs. Winkler in her lifetime. The motion to strike off the lien is therefore not founded upon the true facts, as now alleged under the amendment.

As Mrs. Winkler, under her contract bound her heirs, executors, administrators and assigns, we do not see how those representing her estate can escape the liabilities she had assumed under her sealed contract.

"The death of the owner of the property with whom the contract for an improvement was made, does not affect the right of the lien claimants to perfect and enforce their lien"; 27 Cyc., 52. This rule was applied in *Wagner vs. Hanbeck*, 18

County Court Rep., 471. Where some work was done after the owner's death, a lien for the full claim was allowed: Bounton vs. Westbrook, 74 Ga., 68.

If the representative of Mrs. Winkler after her death gave any direction to the contractor to discontinue work, there is nothing in the record before us to that effect.

Even if it should be held that a lien can not be filed for work and materials furnished after the death of Mrs. Winkler, there is noting on the face of the lien or its amendment to show what items, if any, were furnished after her death. In a motion to strike off the lien we can not go outside of the record.

The 20th Section of the Act of 1901, P. L. 421, declares that a contractor may go on with his work after the death of the owner, or he may refuse to proceed. The section implies that death shall not interfere with the contractor's right of lien, if he goes on with his work after the death of the owner.

If the last item of April 2, 1921, constituted material furnished continuously in the erection and construction of the building, then the lien was filed in time, and the notice of an intention to file was likewise in time.

"The question usually is not so much respecting the length of the interval between the items as to whether the work was ordered and done, in its ordinary progress, from beginning to completion, as conducted by the employer, with an understanding that the employment should continue, though such understanding is not binding as a contract;" Hofer's Appeal, 116 Pa., 560. This language was repeated in Felheim vs. Perry Brewing Co., 63 Pa. Superior Ct., 561; and the Court added: "The word 'continuously' may apply where there is an interval in the progress of the work, and though there be more than one contract."

Whether the last item falls within the requirement that the labor and materials must be finished "continuously" is a question of fact for the jury under the evidence submitted at the trial.

We shall discharge the rule but we do so without prejudice to the defendants to renew their motion to strike off the lien as now amended.

And now July 1, 1922, the rule to strike off the lien is discharged, without prejudice as aforesaid.

In the Court of Common Pleas of Montgomery County.**Rambo & Regar Incorporated, vs. Howard K. Regar et al.**

The plaintiff company purchased from defendant the interest of said defendant's in plaintiff corporation and entered into a written agreement, whereby the plaintiff agreed to transfer and convey to the defendants three-eighths of all thread, silk and yarn owned by the corporation at the cost price thereof. At the time of said agreement there were certain contracts pending, and as the prices of yarn fell, one contract with the consent of plaintiff and defendant was rescinded, whereupon a claim for damages was made and subsequently settled by the plaintiff corporation. Plaintiff then brought suit for the proportionate share for the defendant's liability.

The defendant filed its affidavit of defense, raising a question of law as to the statute of frauds. Under the facts there is a written agreement of which defendant's promise to pay a part of their own debt, therefore, the motion must be dismissed.

No. 121, April Term, 1921.

Assumpsit.

H. I. Fox, Attorney for Plaintiff.

Irvin P. Knipe, Attorney for Defendant.

Opinion by Swartz, P. J., May 18th, 1922.

The defendants sold their shares of stock in the plaintiff corporation. The Company owned a hosiery plant and mill located at Norristown and another situate in Bridgeport. The plaintiff corporation entered into a written agreement with the defendants whereby the latter sold their stock in the company to the corporation and received in part consideration and payment a conveyance to them of the Bridgeport plant.

Both parties in the operation of their respective mills required some of the materials on hand. In part discharge of the consideration under the written contract, the defendants "agreed to accept and the plaintiff company agreed to transfer and convey to the defendants three-eighths of all the thread, silk and yarn owned by the corporation, at the cost price thereof." There were contracts pending for thread, silk and yarn not yet delivered to the plaintiff corporation. The defendants also "agreed to assume the same proportion, namely, three-eighths, of all thread, silk and yarn, under contract by the corporation, and not yet delivered, at the cost price thereof."

The plaintiff alleges in its suit, that this written agreement was fully performed and executed, except as to the pending contract with the Frank F. Pels Company, for 6,000 pounds of Japan silk, not delivered when the written agreement aforesaid was signed. It is also alleged, that the defendants knew and fully understood this Pels contract, at

the time they sold their stock under the written agreement.

The market price of these Japan silks declined and the plaintiff company with the approval of the defendants refused to accept the silk.

A suit for damages by the Pels Company followed. The claim for damages for breach of contract exceeded \$9,000.

The plaintiff company declares, in its statement, that it settled and compromised the Pels suit for \$3,028.36, and that this was done with the full knowledge and approval of the defendants.

Suit is brought against the defendants for the recovery of three-eighths of the sum so paid by the plaintiff company, amounting to \$1,135.63.

If we assume, as we must for the purposes of this motion, that the plaintiff company will establish, at the trial, all the allegations set forth in the statement, we do not see how the defendants can escape liability for the amount claimed under these facts.

The written agreement constitutes an entire contract. When the defendants assumed three-eighths of the outstanding orders and agreed to accept and pay for that proportion of the goods, at the cost price, this assumption constituted a part of the entire consideration. When the plaintiff company "transferred and conveyed" to the defendants a three-eighths interest in the Pels contract, the defendants were entitled to three-eighths of benefits to be derived from that contract and they also assumed three-eighths of the obligations arising thereunder.

If the price of silk had advanced and the plaintiff company had accepted the goods, the defendants would have been entitled to receive their proportionate share of the silk or their damages for its non-delivery.

Under the written agreement the plaintiff company and the defendants, as between themselves, were the joint owners and joint debtors under the Pels contract.

There is no warrant under the written agreement for holding that the plaintiff company shall assume all liabilities under losing contracts, but share with the defendants all profitable outstanding orders.

If the plaintiff company had accepted the silk that de-

Commonwealth vs. Cantanzariti.

clined in market price, the defendants under their agreement would have been compelled to take their proportionate share, and perhaps suffer a greater loss than \$1,135.63.

We do not see how the Statute of Frauds can apply. If there is any liability on the part of the defendants it arises under their written contract. There is no promise to pay the debt of another. The written agreement is a promise on the part of the defendants to pay their own debt. If this is incorrect then there is no obligation against them of any kind.

And now May 18, 1922, the questions of law raised by the defendants are decided against them and they may file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days.

In the Court of Oyer and Terminer of Montgomery County

Commonwealth vs. Cantanzariti.

Defendant was tried and convicted of the murder of one A. Among the witnesses for the Commonwealth was one B, who gave testimony which threw some light on the motive for the commission of the murder. Subsequent to the trial and conviction by the jury, B informed counsel for the defendant that the conversation of which he testified did not take place. Counsel then moved for a new trial. The granting of a new trial is, first, at the discretion of the Court, and whether or not it should be granted depends largely upon the seriousness of the offense for which defendant may be tried. While defendant may have been convicted without this testimony, yet the Court cannot say that the evidence of B was not the controlling evidence leading to his conviction of murder in the first degree. The motion for a new trial must be granted.
No. 9, November Sessions, 1921.

Murder.

Motion for a new trial.

A. H. Hendricks, Attorney for Commonwealth.

J. Ambler Williams and Thomas Foulke, Attorneys for Defendant.

Opinion by Swartz, P. J., April 24th, 1922.

The prisoner, Guiseppe Cantanzariti, was charged with the murder of Guiseppe Iannuce. He plead self-defense at the trial. The jury found him guilty of murder in the first degree.

In this decision we shall call Guiseppe Cantanzariti the accused and refer to Iannuce as Joe or the deceased.

MONTGOMERY COUNTY

Commonwealth vs. Cantanzariti.

On the evening of September 17, 1921, Joe, the deceased, went to a hospital in Norristown, with some fruit for a sick friend. He found that his friend had left the hospital. He then carried the fruit to the house where accused boarded, on Franklin street, in the borough of Norristown. He met the accused and a fellow countryman named Scandoni at this boarding house. Joe shared his fruit with the others and they drank a couple of bottles of wine. The three left the boarding house. Scandoni separated from the others. The latter went to the lodging house of the accused, who was the sole occupant of the building. They arrived at this house on Washington street about nine o'clock. It is located about half a block west of Ford street. Washington street runs parallel with the Schuylkill river and crosses Ford street which leads to the Swedes Ford bridge. This is a covered structure and spans the said river. It is a toll bridge. The eastern side of the bridge is used by the tracks of the Reading Railway. The middle course of the bridge is used as a driveway for vehicles, and on the western side there is a passageway for foot travelers. These three compartments occupy the entire width of the bridge.

The distance to the bridge from the intersection of Washington and Ford streets is about one block.

On the west side of Ford street going toward the bridge there is a high board fence separating the street from a vacant lot. Several boards had been removed from this fence and this left an ample opening for a person to pass from the sidewalk into the vacant lot. This opening in the fence is 137 feet from the bridge entrance. On the eastern side of the street, near Washington street, there is an open shed used by a scrap iron dealer. Under this shed there is a pump. On the same side of Ford street and close to the bridge is the house of Annie Signorovitch. Her husband, daughter Julia, and her son Arthur live with her.

The bridge is 676 feet long and leads into the borough of Bridgeport. The canal bridge on Ford street in the borough of Bridgeport is about 150 feet beyond the south outlet of the river bridge. It has a retaining wall the top of which is nearly ten feet above the water of the canal and about one

Commonwealth vs. Cantanzariti.

foot higher than the surface of the ground abutting on the wall.

On the west side of Ford street, in Bridgeport, there is a guard fence running from the canal bridge toward the river bridge. At the end of this guard fence a telegraph pole is located. The distance from the pole to the canal bridge retaining wall is twenty-four feet.

The surface of the ground from this pole to the canal wall is practically level. The distance from the pole directly across to the canal wall is twenty-four feet. The distance from the bottom of the canal wall across the tow path to the edge of the canal water is eighteen feet. This open space, including the tow path, is nearly level. From the bottom of the canal retaining wall to the water's edge there is a slight fall of the ground.

Joe, the deceased, lived with his family in Bridgeport and the direct way to his home from the lodging house of the accused would take him over the Swedes Ford bridge.

According to the testimony of Mrs. Dimitri, Joe passed her gate on Washington street on his way to Ford street. He stopped and talked with her. Her house is one-half block west of Ford street and the lodging house of the accused was five doors farther to the west on the same side of Washington street. She testified that Joe was drunk. About five or ten minutes after Joe had passed the deceased followed, also going toward Ford street and the bridge. She says ten or fifteen minutes after the two men had passed her house, she heard a noise that sounded like a revolver shot; that is appeared to come from the Bridgeport side of the bridge. She also testified that ten or fifteen minutes after the revolver shot the accused passed her gate, going toward his lodging house. The defendant declared on the stand that he did not go back to his lodging house by way of the Ford street bridge. He testified that after the killing of Joe he ran west on the railroad siding, near the canal bridge, and went as far as the DeKalb street bridge over the Schuylkill; that he crossed that bridge to Norristown and then came east on Washington street to his lodging house. The DeKalb street bridge is about one-half mile west of the Ford street bridge.

Mrs. Signorovitch, who lived on the east side of Ford

street next to the bridge on the Norristown side, testified that about half-past nine o'clock on September 17th, 1921, she saw the accused enter the opening already described in the high board fence. He remained inside a short time and then came out, crossed over Ford street to the scrap yard shed. He went in and came out in about a minute with a handkerchief in his hand. He recrossed Ford street and again entered the opening in the board fence and remained inside until Joe passed by the opening. About two or three minutes after Joe went into the bridge she saw the accused come out of the opening. He hurried to the bridge and crossed over to the railroad tracks on the east side. He could not enter at that point because a box car was standing at the opening. A gate closed the driveway. He looked through the gate and then turned to the foot walk, passed the watchman who called him back. He showed something to the gateman. The defendant testified that he exhibited the card that entitled him to a free passage because he was employed by the railway company.

Mrs. Signorovitch and her daughter came to the bridge entrance and saw the accused run across the bridge. She heard some shots about fifteen minutes afterwards. She says she looked out of her second story window, watching for the return of her husband. She also had some fears for her chickens. This is the reason given for her watchfulness. The mother and daughter saw the accused catch up with Joe before he reached the Bridgeport end of the bridge. They did not see the accused come back after the shooting. The daughter, Julia, and the son, Arthur, corroborate the mother as to the movements of the two men, before and after they entered the bridge.

The accused testified that he and Joe walked along Ford street toward the bridge entrance, that he stood close to the board fence, in the darkness, and attended to a call of nature; that Joe got ahead of him and that he ran after him and overtook him. He denied that he went into the fence opening or into the scrap yard shed. He declared that he did not step into the fence opening, at any time. He does not deny that he crossed Ford street to the railway tracks on the bridge. He testified that he tripped and that caused him to move to the other side of the street.

Commonwealth vs. Cantanzariti.

While the three witnesses agree, that the accused was within the fence opening when Joe passed by, there is no explanation where Joe passed the time that the accused consumed in going through the various movements described by the three witnesses. They say that the lights at the surroundings were sufficient to enable them to see the occurrences they described. They say that the accused hid behind the fence opening and then crossed over to the scrap yard and again entered the opening and went into hiding.

The difficulty in following the sequence of the events described by the three witnesses is not solved, when we remember that all declare that the first man they saw was Joe and yet they are certain that the accused hid behind the fence before Joe passed the opening.

The witness, Russo, called by the accused, testified that he was coming from Bridgeport to Norristown by way of the Ford street bridge; that he saw two men standing at the corner of the canal bridge, about fifteen minutes after ten. A few minutes after he passed the two men, and while he was still in the bridge, he heard three or four shots. The railroad watchman also heard four shots, about five or six minutes after Russo had passed him. The said watchman also heard a cry "Mama"—an appeal to the Virgin Mother.

The accused testified that he started out to accompany Joe to his home in Bridgeport; that he promised him some wine if he would do so. He declared that he stopped at the board fence for the purpose already stated and then caught up to Joe. While on the way Joe asked him to get a job for him on the railroad. The accused was track repairman. He replied he would try and get the position for Joe. The accused declares that after this request and his reply Joe suddenly turned upon him and said, "You son-of-a-bitch, do you want to go any further"; that Joe pulled a knife out of his pocket and tried to cut him; that he did cut the sleeve of his coat and by another blow scraped his arm or wrist; that he was coming towards him with the knife; that he could not get away, on account of the wall, and that he then shot four times and that Joe fell down the bank. He says Joe appealed to the Blessed Virgin to save him. He said fur-

ther that he was afraid that Joe might have some friends who would help him, so the accused ran away.

The bullet that caused death severed a blood vessel near the heart, and the Coroner's physician declares that death must have followed in a few seconds. He also stated that the organs disclosed that the man was dead before the body reached the water. The accused testified that Joe struggled on the ground, fell over the wall and rolled into the water of the canal. To do this it would have been necessary to roll and struggle over the level space of more than twenty feet to reach the canal wall, then the body would have to pass over the top of the wall more than a foot above the level of the ground. To reach the water of the canal, the body, after a fall of ten feet, would have to roll a distance of eighteen feet over ground practically level.

The accused accompanied the officers to the canal bridge and pointed out the spot where the shooting occurred at the telegraph pole. The body was found in the canal, about six hundred feet below the canal bridge.

The accused made no effort to ascertain whether Joe received a mortal wound. He ran away. When Joe's wife made inquiry about her husband, the accused answered that he saw him last on the 17th of September, 1921, when he was at the lodging house of the accused.

He prepared for flight and had his grip packed. It contained a new revolver and cartridges, although the accused testified that he threw the revolver with which he did the shooting into the canal.

No knife was found at the place of the killing.

The accused started to run away after the body was found on September 20, 1921. He was in the trolley car on his way to Philadelphia. While seated in the car he saw Mr. Sarni, the detective of the Norristown police force, who addressed him in a friendly way. He concluded that he was not suspected by the officer, and therefore ended his flight at the first station beyond Norristown. Mr. Sarni is an Italian by birth and the accused knew him as an officer of the law.

The accused called a number of witnesses who testified to his good reputation. He also called a number who declared that Joe had the reputation of being a bad and dangerous

Commonwealth vs. Cantanzariti.

man, especially when under the influence of liquor. The accused, however, admitted that he had never heard of this bad repute and knew him only as a good friend. The accused made a statement at City Hall and explained his connection with the killing of Joe as already recited.

We have given, in substance, the evidence submitted to the jury, except that of the witness, Pelligrini Borelli, who was called by the Commonwealth.

The only reason for a new trial that calls for any consideration relates to the testimony of this witness Borelli.

It was necessary, in our opinion, to set forth fully the other evidence in the case, otherwise the relevancy and importance of the Borelli testimony can not be properly determined.

Pelligrino Borelli testified that he had a conversation with the accused last summer at the DeKalb street station in Norristown. That Cantanzariti, the accused, said that Joe, the dead man, had charged him, Cantanzariti, with shooting Joe in the shoulder; that this was a false charge; that he, Cantanzariti, did not do the shooting; that it was done by a man who had returned to Italy, and that he, Cantanzariti, would get the hide of Joe, the dead man, if it took him three years to do it.

The District Attorney had some trouble in obtaining from the witness the positive declaration that the accused disclosed the name of Joe, the deceased, whose hide the accused intended to take. At first the witness claimed that he did not fully understand the interpreter. We then obtained another interpreter, and the witness stated that he fully understood him. It was then that the witness admitted that the statement he made to the District Attorney was correct, and that the accused did refer to Joe, the deceased, as the man who had made the false charge.

Borelli was the sole witness who testified to a motive or threat on the part of the accused. There was no testimony to corroborate or to contradict his evidence, other than the denial by the accused.

We cautioned the jury to consider this evidence carefully and determine what weight they would give to it.

The jury might well have given full faith and credit to

this testimony, and charged the apparent hesitation to the reluctance of the witness to testify against his fellow countryman, when his evidence might weigh seriously against the accused charged with this grave offense.

The verdict was rendered on Wednesday, February 22, 1922. On Saturday of the same week the witness sent for the counsel of the accused. He stated to the attorney, in the presence of others, that he could not eat or sleep and that he saw animals and flames that disturbed him. He said that he never had any conversation with the accused about Joe, the deceased, and that his evidence at the trial was false, in every respect. He said that he wanted the Court to know that he swore to a lie. He also claimed that the detective, Frank Sarni, induced him to give this false testimony. He was taken before a justice of the peace and made an affidavit setting forth that his evidence in Court was false. He stated in this sworn declaration all the alleged circumstances under which his perjured testimony was given. This affidavit was filed in Court and assigned as the principal reason in support of the motion for a new trial.

We do not see how a stronger confession of perjury could be set forth. He declares, in the affidavit, that his conscience troubling him, he made an appointment with the priest to confess his sin, in swearing falsely against the accused.

When detective Sarni heard of this affidavit charging him with subornation of perjury, he called on the witness, Borelli. Mr. Sarni asked him whether it was true that he made an affidavit charging him, Sarni, with compelling the witness to make his original statement at City Hall. The witness replied that he made no such affidavit before the justice or counsel for the accused. Mr. Sarni then took the witness before Justice Kehoe, where he subscribed his name to the following affidavit:

"When I came to Norristown, Louis Chicarino brought me over, Frank Sarni never threatened me in any manner at the City Hall. Louis Chicarino was the interpreter, and be-

Commonwealth vs. Cantanzariti.

fore I testified no one threatened me in any manner, and whatever I said, I did and said voluntarily."

Officer Sarni was interested in freeing himself from any charge of wrong-doing. The witness retracted all that he said about Officer Sarni's subornation, but so far as the original affidavit on file is a confession of false swearing by the witness at the trial in Court, there is no retraction. The witness can say that the charge made against Sarni is false, but that the affidavit in all other respects is true. The retraction of the part of the affidavit referring to Officer Sarni does not affect the evidence of the witness at the trial.

Depositions were taken on the rule for a new trial. They show that the witness made a voluntary statement at City Hall giving the conversation he had with the accused about Joe. This same statement was also given in the office of the District Attorney and by the witness at the trial.

These depositions also show that the affidavit confessing the false swearing was voluntary and taken at the earnest solicitation of the witness.

Lastly, the depositions show that the retraction as to the charge against Officer Sarni was made voluntarily.

The witness Borelli was not examined by the defendant or the Commonwealth when the depositions were taken.

The evidence of this witness at the trial was important. It was the only testimony showing any motive for the killing and a threat to kill. Upon these matters the witness Borelli stood alone.

The accused and Joe were apparently living under friendly relations. They ate and drank together at the boarding house of the accused on the night of the killing. There was no evidence of any bad feeling on the part of the accused at that time. They were in apparently friendly companionship at the lodging house of the accused. His movements at the Norristown end of the river bridge may have indicated to the jury that he was suspiciously following Joe and seeking an opportunity to kill him. This conclusion the jury might find was well supported by the subsequent occurrences at the canal bridge, but Borelli's testimony was most important upon that point.

It is contended that it is not material to show a motive,

where the prisoner admits the killing. This is true as a general proposition, but when the question arises whether the killing was wilful, deliberate and premeditated, the existence of a motive is a material matter. In *McClain vs. Commonwealth*, 110 Pa., 263, a point was submitted to the effect, that absence of motive was material in a charge of murder. The Court answered, "We affirm this point if the jury find from the evidence that there was an entire absence of motive, so far as a verdict of murder in the first degree is concerned, but it should not raise a doubt as to his being guilty of murder in the second degree." The Supreme Court said, "We find no fault with this answer." See also, *Commonwealth vs. Salyard*, 158 Pa., 501.

While motive is always an important matter, it does not follow that the evidence may not be sufficient to convict of murder, in the first degree, although no motive is disclosed.

Motive is consistent with and indicative of the deliberation and premeditation necessary to convict of murder in the first degree.

A threat to kill is also an important factor when the inquiry arises whether the killing was deliberate and premeditated.

Where a man threatens to kill it is natural that his mind should deliberate upon the subject and the method of carrying out the threat.

Where the circumstances attending the murder may indicate no higher degree than murder in the second degree, a previous threat to kill is important evidence to show that the killing was wilful, deliberate and premeditated: *Kehoe vs. Commonwealth*, 85 Pa., 127; *Trickett on Criminal Law*, Vol. 2, page 811.

It is argued that the verdict of the jury can be sustained even if the evidence of Borelli is eliminated from the case. This may be true, but how can the Court say that the jury was not influenced or controlled by this evidence?

We must assume that the jury based its verdict upon all the evidence in the case: *Chamberlyne's Hand Book Evidence*, Section 140.

A reasonable doubt as to the effect of Borelli's testimony should enure in favor of the defendant: *Wharton's Criminal Procedure*, Vol. 3, Sect. 1812.

Commonwealth vs. Cantanzariti.

If the present testimony of the witness on a material matter is so far contradictory of his previous testimony as to wholly obliterate and destroy its effect, the Court should grant a new trial; Underhill on Criminal Evidence, Sect. 519.

The following rule is suggested in Bishop's Criminal Procedure, Vol. 2, Sect. 1273: "That new trials should be granted more freely in criminal cases than in civil and in criminal more freely in proportion to the gravity of the punishment."

If the Court is in doubt whether the verdict would have been different if the testimony on the material matter had been omitted, a new trial should be granted. The reason given for this test is founded upon the rule that a doubt of this character should enure to the benefit of the prisoner. We are aware that Courts do not favor the granting of new trials upon the ground of the perjury of a witness. In Ruling Case Law, Vol. 20, page 294, the test is stated as follows: "A new trial should not be granted unless the testimony of the witness sought to be impeached was so important to the issue and the evidence impeaching the witness is so strong and convincing that a different result must necessarily follow." But this rule applies to civil cases rather than criminal cases. We do not find that it is so rigidly enforced in criminal cases, especially when the penalty is death.

It is also important to observe the distinction where the witness in a criminal case himself makes affidavit that he committed perjury as to his entire evidence at the trial.

One of the early cases in Pennsylvania upon this subject is reported in 7 W. & S., 415, Commonwealth vs. Flanagan. The defendant was convicted of murder in the first degree. The danger was pointed out if the rule was not observed "that a new trial should not be granted upon after discovered evidence, impeaching a witness who testified at the trial." But in this case the evidence impeached was largely cumulative. A new trial is never granted when the evidence is merely cumulative or where it does not relate to a matter material to the issue. But in the case just cited, we find that the strong opinion against granting a new trial where a witness is impeached, is followed by the more important general rule, "That after a verdict where a motion

for a new trial is considered the Court must judge not only of the competency but of the effect of the evidence. If with the newly discovered evidence before them the jury ought not to come to the same conclusion, then a new trial may be granted." The after discovered evidence in that case consisted chiefly of proofs that the witnesses at the trial gave false testimony.

The authorities whether a new trial should be granted upon perjured testimony at the trial was carefully reviewed in *McEvoy vs. Quaker City Cab Co.*, 267 Pa., 527. The application for a new trial or the opening of the judgment in that case was made after a final judgment in the Supreme Court. This feature of the case was noted. In our case the application for a new trial does not arise after judgment. In a criminal case there is no judgment until the sentence is pronounced. It is also shown in the case cited that the perjured evidence at the trial must be extrinsic and not intrinsic. The evidence is extrinsic when the action or conduct of the prevailing party prevented the losing party from presenting a fair submission of the controversy to the jury. For example, where the defeated party was fraudulently prevented from appearing to make his defence.

To the same effect is *Powell vs. Doyle*, 77 Pa., Superior Ct., 520. This case, however, draws the distinction very clearly, that if the intrinsic evidence as to perjury had been submitted before the entry of judgment the Court would have granted a new trial.

In *Commonwealth vs. Brady*, 76 Pa. Superior Ct., 488, the Court refused a new trial where one of the witnesses for the Commonwealth alleged he committed perjury at the trial. But the deposition of this witness was only cumulative testimony, and he was an inmate of a penitentiary. The Appellate Court determined that it would not interfere with the discretion of the lower Court. The Court laid down the well-established rule that the newly discovered evidence must be such as could not have been produced at the trial by the exercise of reasonable diligence, that it was not merely cumulative and that it would render a different result probable on a re-trial.

We do not see how the defendant or his counsel could

Commonwealth vs. Cantanzariti.

be prepared to meet the perjury of the witness Borelli. The evidence was a surprise so far as we have any testimony upon the subject. We do not see how the defendant could have prepared to answer the perjury. The only parties to the alleged conversation at the DeKalb street station were the defendant and the witness Borelli.

Where a verdict is obtained through perjury the Court may grant a new trial *nunc pro tunc*: Wickel vs. Mertz, 49 Pa. Superior Ct., 472.

There are numerous cases in our lower Courts where new trials were granted because a witness committed perjury. In Commonwealth vs. Nicholas, 23 Lanc. L. R., 91, the defendant was convicted of larceny. New trial granted because the principal witness declared that he gave false testimony.

In Commonwealth vs. Yot Sing, 7 Kulp, 349, Judge Rice declares that a new trial should be granted to prevent a palpable wrong where a witness testified falsely at the trial.

In Commonwealth vs. Stoy, 25 Dist. Rep., 937, a new trial was granted because of the perjury of a witness. The Court referred to the opinion of Judge Rogers in Boyd vs. Boyd, 1 Watts., 365, where the distinguished jurist said: "A motion for a new trial is an application to the sound discretion of the Court, and is not governed by the technical rules applicable to a writ of error."

Whether the perjury of a witness is sufficient cause for a new trial is a matter vesting in the sound discretion of the Court: Shanahan vs. Insurance Company, 6 Pa. Superior Ct., 65.

A mistake by a witness on a material matter relating to the issue held sufficient to grant a new trial: City Trust Co. vs. Shoff, 17 Dist. Rep., 857.

In Commonwealth vs. Roddy, 19 Pa. C. C. R., 321, the prisoner was convicted of murder in the first degree. Two witnesses testified, at the trial, that they saw the accused near the house of the deceased, on the night of the murder. Afterwards it appeared that the witnesses made a mistake or swore falsely, and that the time they saw the accused was at least a month before the date of the murder. A new trial was granted on the ground that the depositions took the two witnesses entirely out of the case.

In *Struthers vs. Wagner*, 6 Phila., 262, after a verdict, it was shown by the affidavit of Anna Thompson that a witness at the trial swore falsely to a material matter at issue. Depositions were taken and it was intimated that some art was used to induce Anna Thompson to make the affidavit. On her cross-examination she seemed disposed to equivocate. Judge Sharswood in granting a new trial declared, "but in such a case as this, even if the new testimony were open to damaging comments, we think, that justice requires that the defendant should have the opportunity of having the whole evidence submitted to another jury."

The American authorities are not uniform upon the question whether a new trial should be granted where there is evidence that a witness committed perjury at the trial.

We are convinced, however, that the weight of authority is in favor of granting a new trial, where a witness upon a material matter at issue himself swears that he committed perjury. But it should also appear that his evidence was not cumulative and that if eliminated from the case the proofs at the trial would be silent upon said material matter. We think this rule is freely applied where the penalty for the offense charged is death.

In *Myers vs. The State*, L. R. A., 1915 C, 302 (Arkansas), the prisoner was convicted of rape for which the penalty in that state is death. The principal witness afterwards made affidavit that her testimony against the accused was false. At the taking of new depositions for a new trial she reaffirmed her original evidence. The Judge refused a new trial, but the Appellate Court reversed and ordered a new trial.

In *Dennis vs. The State*, 2 North Eastern, 349 (103 Ind., 142), a principal witness made contradictory affidavits after the trial. The Court awarded a new trial, saying in effect that it was impossible to determine what a jury might do upon the new aspect of the testimony of this witness.

In *Sewart vs. Cease*, 50 Ill., 228, an all important witness made affidavit that his testimony at the trial was false. The Judge refused a new trial but the Appellate Court awarded a new trial, saying, "This then is not a case of conflicting evidence. An unrighteous judgment has been obtained upon perjured testimony, and the perjury is shown not by un-

Commonwealth vs. Cantanzariti.

certain admissions of the perjurer, but by his own oath voluntarily made for the purpose of repairing his wrong. A stronger case could hardly arise."

A trial judge should set aside a verdict obtained through perjury: *Serrver vs. Serrver*, 75 N. Y. Sup., 842; *Chapman vs. Delaware Railroad Co.*, 92 N. Y. Sup., 304.

Where affidavits submitted raise a presumption that the testimony given upon a crucial point was perjured a new trial should be granted: *Piper vs. State*, 124 South Western, 661 (Texas); *State vs. Powell*, 98 Pacific, 741 (Washington).

The Court must consider what the probable effect would have been upon the verdict of the jury had the testimony of the witness been presented to them as it now stands before the Court. If he cannot solve this problem, it follows that the accused should have a new trial: *Benda vs. Keil*, 69 N. Y. Sup., 655.

True, the witness Borelli may have told the truth at the trial and may now seek to save his fellow countryman by introducing a false affidavit. But we have no evidence before us upon which we can base such conclusion or inference. He may have been threatened or unfairly influenced to make the affidavit. But again, we say, where is the proof upon which such findings can be based by the Court.

We are aware that a new trial will add expense, annoyance and loss of time and that the second verdict may confirm the first. But a life is at stake and we dare not act upon mere speculation.

We do not wish to evade our responsibility, but a judge before he sends a man to the electric chair should have the support of a verdict upon evidence that is not tainted with perjury.

We have a right to know what conclusion the jury would reach upon the testimony as now presented to the Court before we pronounce the sentence of death.

We have no verdict of a jury based upon the evidence as it now stands before the Court. A judge can not send a man to the electric chair, although convinced that the evidence justifies such judgment unless the prisoner pleads guilty and submits his case to the Court to determine the degree of guilt.

Because of the importance of the case we have given much

McClure vs. Express Co.

time, research and study to the application for a new trial. We cannot see any way to carry the verdict into execution as the case now stands before the Court.

And now, April 24, 1922, the fifth reason for a new trial is sustained, the rule is made absolute, and a new trial is granted.

In the Court of Common Pleas of Montgomery County.

McClure vs. American Railway Express Co.

Plaintiff sued defendant to recover for damages caused by reason of collision with his, plaintiff's, car. The jury found a verdict in favor of the defendant and plaintiff moves for a new trial alleging that the plaintiff was not guilty of contributory negligence. Under the evidence as submitted by the plaintiff he had admitted that he was running his car at such a rate that he could stop within the distance of ten feet, while the evidence of the defendant was to the effect that he was running rapidly and that the plaintiff hit the defendant and not the defendant the plaintiff. Under the testimony a motion for a new trial must be dismissed, because the evidence of the son of the plaintiff shows that he was guilty of negligence.

No. 216, June Term, 1921.

Trespass.

Motion for a new trial.

Monroe H. Anders, Attorney for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Miller, J., May 23rd, 1922.

The touring car of the plaintiff, driven by his son, engaged in his father's business, and a truck of the defendant, being operated by its servant, collided on West Main street, in Norristown, and both vehicles were injured. Each owner sues the other for damages, Mr. McClure having first brought suit, and the actions were tried together. The verdict was for the defendant in both cases. This plaintiff asks for a new trial and assigns as the only reason therefor that the verdict in his case was against the weight of the evidence.

Main street is 46.8 feet wide from curb to curb and the accident happened on a clear day in broad daylight. Some distance back from the north side of the street there is a garage into which leads a driveway. Defendant's truck came east in the street, southerly of its middle line, and turned across to its left to enter this driveway. Plaintiff's car was, at the time, coming west on its right, or the north, side of the street and the collision occurred near the entrance to the driveway. Un-

McClure vs. Express Co.

der the testimony, and for the purpose of this motion, negligence on the part of defendant's driver may be conceded. This case turned, therefore, on the alleged contributory negligence of plaintiff's son and, in consequence, the reason for a new trial is directed, and counsel's oral argument and written brief were confined to this branch of the case.

Stated in the light most favorable to the plaintiff and gleaned entirely from the testimony of his witnesses, the McClure car was being driven at, approximately, 15 miles per hour and its driver testified that he could have brought it to a full stop within a distance of 10 feet. The defendant's truck was first observed when on the opposite side of the street and 200 feet away. When it was turned to its left for the purpose of crossing the street, toward the garage entrance, plaintiff's car was still some 40 feet to the east of that entrance. The course of the truck and that of the car would, therefore, have crossed. The driver of the latter did not, in these circumstances, reduce his speed, apply his brakes, or change his course, but kept right on. He did nothing to avoid the accident and the vehicles came together. The plaintiff was, of course, under the testimony, bound by the act of either commission or omission of his son.

The plaintiff was, in the first instance, not only required to satisfy the jury by the weight of the evidence that the defendant had been negligent and that negligence caused his injury, but he had to do more. If, in the presentation of his case, there was a burden at all in relation to the factor of contributory negligence, it also rested on the plaintiff. He was bound to make out a case clear of such negligence on his part, and this may be properly described as also a burden, though a negative one: *Heiss, appel., vs. Lancaster*, 203 Pa., 260; *Albrecht vs. Erie City, appel.*, 265 Pa., 453.

He was not, however, required to prove negatively that he himself had not been guilty of negligence that contributed to the result. *Clark, appel., vs. Lancaster*, 229 Pa. 161.

Under the testimony offered by him alone the jury might, therefore, reasonably have found that he failed to discharge his burden, in this respect, and the verdict rendered would not have been against the weight of the evidence, but amply supported by plaintiff's proof of his own contributory negligence.

It is only when the plaintiff makes out a *prima facie* case, without disclosing contributory negligence, that the defendant must assume the burden of making out his defense. If contributory negligence is matter of defense, the *onus probandi* then is on the defendant; *Baker vs. Westmoreland and Cambria N. G. Co.*, *appel.*, 157 Pa., 593.

There was no motion for a compulsory non-suit in this case. The testimony of the defense, so far as it related to the contributory negligence of plaintiff's son, was, in substance, that he was traveling at 35 miles an hour and did not reduce his speed; that when defendant's truck attempted to cross the path of plaintiff's car, the driver of the former believed that it was still a safe distance away; and that the car actually hit the truck, and not the truck the touring car.

No matter how negligent the driver of the truck may have been, the testimony bearing on young Mr. McClure's contributory negligence, coming from plaintiff's side, was, in our opinion, alone sufficient to support the verdict, while that introduced by the defendant, if believed by the jury, required it. The verdict was, therefore, not against the weight of the evidence and should not be disturbed for this reason.

And now 23d May, 1922, the motion for a new trial is overruled, the reason is dismissed and the prothonotary is directed to enter judgment in favor of the defendant and against the plaintiff, on the verdict, on payment of the verdict fee.

In the Court of Common Pleas of Montgomery County.**Mahan vs. Pawling**

Plaintiff filed his bill in equity for an injunction against defendants for violation of building restrictions contained in a deed. The restrictions related to the construction of any building such as the garage at a certain distance from the middle of any street. The defendant's lot fronted on a public street, and at the time that he purchased his lot, the plaintiff had planned for a street connecting two public streets running along the side of defendant's lot. The defendant claimed that his garage was connected with the house, the connection being by means of having a pergola erected between the rear of the house and the garage, which pergola was to be enclosed and used for flowers and plants; he also denied that the erection of a garage was in violation of the building restriction, because the street on the side was not a public street.

The plaintiff purchased a large tract and for the purpose of better development, laid out the street in question, and under the terms of defendant's deed the street in question is a private street, and private streets were not subject to the building restrictions as contained in the deed, and further the physical connection which defendant had erected to connect the garage and the house was such that would make the garage a physical part of the same. The bill must, therefore, be dismissed.

No. 3, February Term, 1922.

Equity.

Hearing on bill, answer, replication and proofs.

Monroe H. Anders, Attorney for Plaintiff.

Thomas O. Haydock, Attorney for Defendants.

Opinion by Swartz, P. J., June 8, 1922.

The bill was filed to restrain the defendants from erecting a garage building within one hundred feet from Brookway Avenue, in the township of Lower Merion. The bill alleges, that such construction, within the distance aforesaid, is in violation of the building restriction found in the deed from the plaintiff to the defendant, George F. Pawling.

The answer of the defendant denies that the garage, in process of construction, is located in violation of any building restriction imposed under the deed of the plaintiff to Mr. Pawling or by the deed of Frank G. Thomson, who conveyed to Mr. Mahan.

The defendants contend that Brookway Avenue is a private street and that the restriction in the deed from Mr. Mahan and his predecessors in title applies to public streets or highways and not to private roads or streets.

They also contend that the garage under construction is contiguous to and a part of the dwelling houses erected on the lots conveyed to Mr. Pawling, and therefore within the exception found in said restrictions.

It is also alleged in the answer that the plaintiff can not invoke the equitable remedy sought by him, because he, himself, violated the said restrictions.

FINDINGS OF FACTS.

1. On the 23rd day of June, 1916, the plaintiff, Frank H. Mahan, purchased a tract of about thirty-two acres from Frank G. Thomson and others, situate in the township of Lower Merion, Montgomery county. The ground abutted on Merion Avenue, Civic Circle and Bowman Avenue. These were the only public highways surrounding the tract. At that time there were no other streets, public or private, opened or located on the tract.

2. The deed from Mr. Thomson to the plaintiff contained the following restrictions:

"Only detached buildings shall be erected upon the premises conveyed except that any private stable garage or other outbuildings necessary or appurtenant to the use of a dwelling house may be built contiguous to and as a part of said dwelling. No garage stable or other outbuilding unless contiguous to and a part of the dwelling house as hereinbefore referred to shall be erected within one hundred feet of the center line of any of the streets upon which said premises abut or of any of the streets passing through or over said premises. Lots backing on the railroad and any lot fronting on Civic Circle shall have a frontage of not less than sixty feet upon which not more than one dwelling shall at any time hereafter be erected, said dwellings to cost not less than five thousand dollars (\$5,000). Lots fronting on Merion Avenue shall have a frontage of not less than eighty feet upon which not more than one dwelling shall at any time hereafter be erected at a cost of not less than eight thousand dollars. All lots fronting on Bowman Avenue and on any other street which may at any time hereafter be opened (except lots backing upon the railroad aforesaid) through or upon said land to be conveyed hereunder shall be not less than seventy feet front each, upon which not more than one dwelling shall at any time hereafter be erected and such dwelling shall not cost less than six thousand dollars (\$6,000) to so build. No cost of grading or improvement of any portion of the premises appurtenant to any building shall be included in the calculation of the cost of the said building. The restrictions hereby imposed shall cease to be operative from and after January First, A. D. 1941."

Mahan vs. Pawling.

3. Mr. Mahan divided the property into building lots. He laid out and opened Sycamore Avenue and Valley Road. Sycamore Avenue ran east and west to Valley Road. The latter was parallel to the Pennsylvania Railroad. Sycamore Avenue divided the tract and entered Valley Road at right angles. Mr. Mahan sold twenty-one lots abutting on the original streets and the said two streets opened by him.

4. After the sale of the twenty-one lots aforesaid, he made a deed to Mr. Pawling, on October 1, 1919.

At that time and before he sold to Mr. Pawling he projected two other streets, Brookway Avenue and Calvert Road. He exhibited a draft to Mr. Pawling indicating the location of Brookway Avenue and Calvert Road. This was at the time the sale was made to Mr. Pawling for the lots in question. These streets were not opened at that time. For reasons that were satisfactory to the parties, Brookway Avenue was shifted two feet to the south from its projected original location.

5. The original development contemplated the opening of Brookway Avenue to Valley Road, parallel to Sycamore Avenue and then to run another street farther to the north also parallel to Sycamore Avenue. It was found that this was not a feasible development, and then Mr. Mahan decided to lay out and open Calvert Road, parallel to Valley Road from Sycamore Avenue to Bowman Avenue. This new arrangement caused him to terminate Brookway Avenue, where it met Calvert Road. All these changes, however, were projected before the sale was made to Mr. Pawling and he had full knowledge of this existing plan of development.

6. The lot sold to Mr. Pawling, on October 1, 1919, has a front on Merion Avenue of one hundred and seventy-five feet and a depth of about one hundred and fifty feet. The rear width is only one hundred and fifty-five feet. The beginning is described as a point at the intersection of the middle line of Merion Avenue and the middle line of a proposed road, forty feet wide. The following restrictions are found in this deed: "The grantee, his heirs and assigns, shall covenant that neither he nor they will at any time hereafter use any part of the property conveyed or any buildings thereon erected, or any part of any such building for other than residential purposes,

Mahan vs. Pawling.

with such private stables, garages and other outbuildings as may be necessary or appurtenant to such use; provided however, that the grantee, his heirs and assigns, shall have the right to erect a church or churches and buildings necessary or appurtenant thereto on any portion or portions of the above described property, subject to the remaining restrictions herein contained; and provided further that the grantee, his heirs and assigns may use any portion or portions of said premises as and for a club for athletic or social purposes and may erect thereon necessary and appropriate buildings for that purpose, subject in like manner nevertheless to the restrictions hereinafter contained. Only detached buildings shall be erected upon the premises conveyed, except that any private stable, garage or other outbuildings necessary or appurtenant to the use of a dwelling house may be built contiguous to and as a part of said dwelling. No garage, stable or other out-building, unless contiguous to and a part of the dwelling house as hereinbefore referred to shall be erected within one hundred feet of the centre line of any of the streets upon which said premises abut or of any of the streets passing through or over said premises."

7. The proposed street, forty feet wide, is Brookway Avenue, already described. This deed to Mr. Pawling also contained the provision; "that the said Frank H. Mahan, for himself, his heirs and assigns, doth covenant that he will within one year from the first of August, 1919, lay out and open the hereinabove private road referred to, and will macadamize the said road and make and complete all improvements, including the sewer, at his own proper cost and expense."

8. Mr. Mahan laid out and opened said private road within the year stipulated, although it was not fully ready for use on August 1, 1920. He macadamized the road, constructed side gutters and curbs, on each side, suitable for a private road.

9. For some time it was closed by barriers placed across its entrance, at Merion Avenue. The building contractors used it, at times, by removing the barriers. The public also made some little use of it. Barrels and rails were across the entrance as late as November, 1921, and it was practically

Mahan vs. Pawling.

closed until March, 1922. Mr. Mahan admits that he closed it to save the road from use by the heavy teams of the building contractors.

10. There is no evidence that the township commissioners of Lower Merion at any time took charge of the road, or that Mr. Mahan dedicated it to public use.

No plan or draft of any kind was filed by Mr. Mahan in the Recorder's office, at Norristown, to show the character of his development or the streets that he laid out. Brookway Avenue offers no conveniences as a public highway. It is only about 350 feet long and runs from Merion Avenue to Calvert Road. A through vehicle, travelling north and south or east and west, would go out of its way to pass over this street. Its use would be confined to the occupants of lots on the street or in the immediate vicinity and to the tradespeople dealing with them. It is a private street, opened only in aid of a development to make more lots.

11. Building lots on Merion Avenue, under the restriction, were to have a frontage of not less than eighty feet. Mr. Pawling purchased 175 feet or two lots. Under contract of sale from him or his grantees, Evan L. Moore is now the owner of the lot, at the corner of Merion Avenue and Brookway Avenue, and Frank J. Keefe is the owner of the other half of the 175 feet. Each owner is building a house upon his lot, now almost completed. The garage in question is a double building intended to accommodate the respective owners of the divided ground.

12. The north end of the garage in question, as located, is only sixty-seven feet from the middle line of Brookway Avenue. While the original lot had a frontage of 175 feet, on Merion Avenue, its width in the rear is but 155 feet. It follows that each owner of the divided lot has less than eighty feet along his rear line. He could not build a garage 100 feet away from the middle of Brookway Avenue. The property line, according to the deed from Mr. Mahan, runs along the center of Brookway Avenue. To comply with the restriction, if it applies to Brookway Avenue, each owner would be compelled to build his garage "Contiguous to and as a part of his dwelling."

The same difficulty arises as to the other lots on the plan,

Mahan vs. Pawling.

especially as to corner lots. It is impossible, in case of single corner lots to so locate a separated garage that it will be distant one hundred feet from both streets. The corner lot directly opposite the Pawling ground has a depth of 114 feet, measured from Merion Avenue. The corner lot at Brookway and Calvert Road has a rear depth on Calvert road of 82 feet. The lot at the corner of Sycamore Avenue and Valley Road has a rear depth, on Sycamore Avenue, of 111 feet. The lot at the corner of Bowman Avenue and Calvert Road has a rear depth, on Calvert Road, of 95 feet. There are other lots on the plot in a like situation.

All the lots are so located that a separate garage can be erected 100 feet distant from the center line of the street upon which the lot has its frontage.

14. The garage under construction is about 20 feet by 45 feet in size. It is thirty-five feet distant from the house erected on the lot. There is a pergola construction running from the house to the garage. A double row of pillars runs between the house and the garage. Beams or girders are laid on these pillars, connecting the house and the garage. There is also a double line of hot water pipes running near the top of the pergola. The plant in the house furnishes the heat for the garage through these pipes. Mr. Moore says he contemplates placing window sash on all sides of the pergola, so as to form a conservatory or green house for his wife's plants. A cement walk will run through the pergola from the garage to the house. Mr. Mahan, the plaintiff, viewed this pergola construction, as far as completed, and testified that it looked very pretty, but he was unable to say whether this connection made the garage contiguous to and a part of the house. It is evident that he did not regard the arrangement a detriment to his own properties or to those in the neighborhood owned by others.

He was a fair and conscientious witness, and this action, we are convinced, was brought with a desire to protect the rights, if any, of the persons to whom he sold lots, and not to serve his own purposes.

15. The plaintiff sold some lots to Mr. Scott, who erected a number of houses. One of the lots has a separated garage that is less than 100 feet from the center line of a street.

Mahan vs. Pawling.

The plaintiff, under existing contracts, now holds the legal title to this lot. There is an outstanding option. If it falls the fee will vest in the plaintiff.

A lot at the corner of Sycamore Avenue was sold by the plaintiff before Calvert Road was laid out and opened. A separated garage stood on this lot. When the plaintiff located Calvert Road he opened the street, so that the said garage was only 75 feet distant from the center line of Calvert Road. Mr. Mahan opened said street under a complete change of development adopted by him. This garage, now on the lot, at the corner of Calvert Road and Sycamore Avenue, was erected in strict compliance with all the building restrictions. The plaintiff by his new development left the garage in a situation in conflict with said restriction. There was no necessity to lay Calvert Road so close to the existing garage. It made a more convenient and profitable plan of lots for the plaintiff, and that was the motive in locating the street as it now exists.

DISCUSSION.

The private road which the plaintiff covenanted to open and macadamize was afterwards called Brookway Avenue. It ran into Calvert Road, a street that was also projected on the plan and opened by the plaintiff at the same time Brookway Avenue was macadamized. The plan of lots was never filed of record in the Recorder's office. A large number of the lots on the plan were sold by the plaintiff before he made his deed to Mr. Pawling. All these lots so sold, were described as abutting on the streets then opened. At this time there was no Brookway Avenue or Calvert Road.

There never was any formal dedication to public use of any of the streets laid out by the plaintiff other than the sale of lots in accordance with a plan that was developed as each lot was sold.

There was a slight shifting of the projected Brookway Avenue at the time the sale was made to Mr. Pawling. However, no street was changed in location after it was once actually opened.

The public made little use of Brookway Avenue and the plaintiff for some time after it was opened placed barriers across the entrance to protect the roadbed. Evidently he

Mahan vs. Pawling.

thought it was his duty to preserve this private road. His supervision over the private road continued to the time the bill in this case was filed. Barriers were up as late as March, 1922.

The said street has every appearance of a private way. It is not a through road. It leads nowhere, except to connect Merion Avenue and Calvert Road. The lot occupants in the vicinity and the merchants trading with them are the only persons who have any occasion to use the street. The defendants' lot fronts on Merion Avenue and the lot in its rear owned by the plaintiff fronts on Calvert Road. The lots on the other side of Brookway Avenue apparently front on that street, but they are unimproved and there is no reason why they may not be rearranged into two lots fronting on Merion Avenue and Calvert Road respectively, just as the opposite neighbors fronted their lots.

Brookway Avenue as now located and opened was an afterthought to overcome certain difficulties in the plaintiff's scheme of development. It was not intended or needed for public travel. It provided an advantageous way to put more lots into the market.

A view of the street, its surroundings, connections and condition, all combine to convince the observer that the plaintiff intended Brookway Avenue to be used only as a private street, just as he declared in his deed to Mr. Pawling.

The plaintiff owned all the land over which the private street was located and opened; if he saw fit to limit the character and use of the street, he had the right to do so, and those taking title from him, with full knowledge of his express intention in his deed of conveyance, cannot change the character of the street without legal proceedings to make it a public highway.

It is true, "That a deed of land, in accordance with a plan of lots and streets, made by the owner of the land, has the effect to dedicate to public use the strip of land designated as streets, and gives the right to use the street, not only to purchasers of lots on the plan, but to all other persons who might desire to use the streets; and the dedication is irrevocable by either the grantor or those claiming title under him": Osten-

Mahan vs. Pawling.

heldt vs. Philadelphia, 195 Pa., 355; Shamokin vs. Helt, 250 Pa., 80.

But it does not follow that an owner, in laying out a plat, may not designate a small side road as a private street when the way is not needed for a public highway. Even if it is a private street, the owners of lots fronting or abutting thereon, or located in its vicinity, may use it. Such a private street is laid out for their use. Because a large number of occupants have the right to use the private road does not make it a public street. Elliott on Streets, page 7.

There is no rule of law that compels an owner who opens a street, over part of his ground, to dedicate it to public use. His action may make it a public street in the absence of an expressed intent to the contrary. A man may use his own property for such purposes as he sees fit, so long as he does no injury by such use to the rights of others.

We therefore conclude that Brookway Avenue is a private street.

The word street, standing alone, means, in common parlance, a public highway: Fitzwater Road, 4 S. & R., 106. "Street" means any public way; Words and Phrases, Vol. 7, page 6685, and cases there cited.

It follows that the restriction in the Pawling deed, when it declares "that no garage, stable or other outbuilding shall be erected within one hundred feet of the center line of any of the streets upon which said premises abut," refers to public streets and not to a private street or road.

The grantor in his deed used the word "street" and the words "private street." He must have done so with the intent to draw a distinction in the meaning of the two designations.

There is another reason in support of our conclusion, that this private street was not included in the prohibition, that a garage must be located not less than 100 feet from the center line of a street.

The restrictions give the right to build a separated garage. There is nothing to indicate that the buyer of a lot can be compelled to erect his garage "contiguous to and as a part of the dwelling." He has his choice. Building a contiguous garage is the exception. No garage shall be built

Mahan vs. Pawling.

within one hundred feet unless it is contiguous to the house. "Only detached buildings shall be erected upon the premises" is the major proposition.

If the interpretation of counsel for plaintiff is adopted then the owner of the lot next to Brookway Avenue can not build a detached or separated garage. Mr. Moore, the owner of the lot at the corner of Merion Avenue and Brookway Avenue, has a depth of less than ninety feet on Brookway Avenue. The grantor provided that lots on Merion Avenue must have a frontage of not less than eighty feet. He and his predecessor in title fixed this width. The grantors, therefore, by their own acts, made it impossible to erect a separated garage on these corner lots if the plaintiff's interpretation is adopted.

In construing a restriction the main purpose of the parties must not be ignored.

Houses were to be erected a certain distance from the front street. The garage was to be located still more distant from this street. The defendant located the garage as far back from Merion Avenue and as far distant from Brookway Avenue as possible. The spirit and intent of the restriction was observed.

We must assume that there are still many purchasers of lots for suburban homes who do not approve of a garage attached to the dwelling house. There are noises, odors and fumes at a garage that are at times very undesirable and objectionable. A stable, under the restriction, is placed upon the same basis as a garage. We cannot conceive that any promoter of a building development, of the class to which Mr. Mahan's tract aspires, would compel a lot purchaser to attach his horse stable to his dwelling house. And yet that is the result if the 100 feet limitation applies to Brookway Avenue. Mr. Mahan may have considered this difficulty when he determined to make Brookway Avenue a private street.

We must interpret these restrictions in favor of the grantee so far as the language used will admit.

In the interpretation of a restriction the circumstances and conditions surrounding the parties and property must be considered. The intent, object and purpose of the restrictions must govern. Corpus Juris, Vol. 18, page 386; Rabinowitz vs.

Mahan vs. Pawling.

Rosen, 269 Pa., 482. In restrictions of this kind all doubts are to be resolved against the restriction and in favor of the free and unrestricted use of the property: *St. Andrew's Lutheran Church's Appeal*, 67 Pa., 512; *Johnson vs. Jones*, 244 Pa., 244; *Asbury vs. Carroll*, 54 Pa. Superior Ct., 97.

The evidence at the conclusion of the trial indicates that the location of the garage does not depreciate the value of the surrounding property. Mr. Mahan's lot at the corner of Calvert Road and Brookway Avenue, as now laid out, fronts on Calvert Road. The dwelling house, therefore, would not be located near the defendant's garage. There is no evidence that the location of the garage interferes with the beauty, symmetry, harmony or development of the Mahan tract. It is not a nuisance. If built directly against the house it could be brought out within about fifty feet of Brookway Avenue.

It may be argued with some force that the restriction as to the 100 feet was intended to apply to the street upon which the lot fronts. This would give uniformity in the location of all detached garages. This is the interpretation that was given by some of the owners.

The lot at the corner of Valley Road and Bowman Avenue fronts on Valley Road. The garage is erected on the rear of the lot close to Bowman Avenue. Such interpretation by owners is of some moment, especially where there may be doubt as to the meaning of the restriction.

We shall not base our decision upon the ground just discussed. We are not fully convinced that a lot owner is entitled to erect a separated or detached garage where it is impossible to locate such garage 100 feet from the public side street of a corner lot. It may be that under the restrictions he must connect the garage with his house or do without one.

We have discussed the difficulties that confront the purchaser of a corner lot and considered the improbability that any lot development would force the owner of a suburban home to attach a stable or garage to his dwelling house. A consideration of these matters adds support to our conclusion that the restriction can not be enforced where the side street of the corner lot is nothing more than a private road.

These facts and circumstances in connection with this private street at least raise a doubt whether the restrictions apply

Mahan vs. Pawling.

to Brookway Avenue, and such doubt is sufficient to defeat the bill. *Howland vs. Andrus*, 81 N. J. E., 175.

It is also shown that the plaintiff himself violated his own interpretation of the restriction. He owns a lot where the garage is not attached to the house, unless a pergola constitutes such attachment. He saw this garage erected in violation of the restriction, if it was a violation, without any remonstrance on his part. If he is now the owner, he maintains a garage in conflict with his own interpretation of the restriction.

He laid out Calvert Road after a garage was constructed on the lot at the corner of Calvert Road and Sycamore Avenue. He so located Calvert Road as to bring this garage within seventy-five feet of the new street. He changed the plan of streets in his development to suit his own convenience, advantage and profit. He owned the land on the other side of this located street and there was no necessity to bring the new street within the alleged prohibited distance, except for his own gain. This new street was not projected until after the owner had erected his garage 100 feet from the existing street.

The complainant cannot violate the restrictions imposed by himself and compel others to observe them. He must come into the Equity Court with clean hands: 22 Cyc., 864; *Clark vs. Martin*, 49 Pa., 297; *Smyth vs. McCarroll*, 36 Montg. Law Rep., 227, and cases there cited.

We viewed the premises so we could gain a better understanding of the evidence as to the garage construction and surroundings. The distance from the house to the garage is less than thirty-five feet, if the measurement is made from the cellar wall projection and porch entrance. The double row of pillars and the beams or girders laid on them connect the house and garage. Cross boards are laid over the beams and form the top of the structure. The open space within the pergola is about seven feet wide. Two heating pipes run near the top of this open space, from the garage to the house. The beam or girder on the west side enters the wall of the house. The garage will be heated from the plant installed in the house. Mr. Moore intends to use window sash to inclose the pergola, so as to form a conservatory for his wife's plants. This part

Mahan vs. Pawling.

of the work is not constructed, but we can not, at this time, question the sincerity of the witness.

If the conservatory is attached to the house, then it may well be termed a part of the dwelling house construction. If so, then there is a continuous house construction connecting with the garage.

We noticed that many of the houses on the development are connected with the garage by a structure above ground and an open space underneath. If an overhead construction forms an attached garage, as it clearly does, the difference between such attachment is not far removed from a connection on the ground surface as contemplated by the defendants. They are making an honest effort to observe both features of the restriction, by placing the garage 100 feet from Merion Avenue and by a connection with the house so as to avoid any violation as to Brookway Avenue if the latter street is included in the 100 feet limitation.

We are of opinion that they have complied with the requirements even if Brookway Avenue is an abutting street within the meaning of the restriction.

We agree with the plaintiff that the design looks "pretty" and we may say that, in our opinion, it adds to the harmony and attractiveness of the structures, as a whole.

There is a provision in the deed from Mr. Thomson to the plaintiff, declaring that lots fronting on streets which may at any time hereafter be opened shall have a frontage of not less than seventy feet.

It is contended that this provision fastens on all lots fronting on streets to be opened in the future the same restrictions in all respects that apply to streets existing when the deed was executed.

We cannot follow this conclusion. The absence of any reference to garages or the distance they may be located from future streets may indicate, that the restrictions as to the 100 feet limitation was not intended to apply to streets to be opened in the future.

This, however, is an immaterial inquiry, if we are correct in our conclusion that Brookway Avenue is a private street or that the garage is a part of the dwelling house.

Upon a careful consideration of all the facts and the law

Mahan vs. Pawling.

applicable to them, we are convinced that the plaintiff's right is not so clear as to justify the strong arm of the Chancellor to remove the garage.

The defendants located their garage as far as possible from Brookway Avenue. If it was necessary to place it at the least objectionable location they have complied with the requirement.

CONCLUSIONS OF LAW.

1. Brookway Avenue being a private street the restrictions in the deed to the defendants do not require that a garage on the corner lot at Merion Avenue and Brookway Avenue should be located 100 feet from Brookway Avenue.

2. Under the evidence the garage in question, when completed, will constitute a building that is contiguous to and a part of the dwelling house.

3. The plaintiff has by his acts interfered with the observance of the restrictions in locating Calvert Road within 100 feet of an existing garage which was erected in compliance with the restrictions. There was no excuse or occasion for such violation of the restriction, other than the development of his plat for his own profit and advantage. His own conduct estops him from bringing this action.

4. The bill should be dismissed at the costs of the plaintiff.

And now June 8, 1922, the foregoing findings of facts and conclusions of law are filed in the office of the prothonotary, who will give notice forthwith to the parties or their counsel of such filing and enter a decree nisi, and if no exceptions are filed as required by the Equity Rules, he will enter a final decree accordingly, dismissing the bill at the costs of the plaintiff, as of course.

In the Court of Common Pleas of Montgomery County.**Harris vs. Bodey.**

Plaintiff brought an action in ejectment against defendant for possession of property which was held by the defendant under a lease containing an option to buy, and under a prior action of ejectment, rent in arrears, costs, and a small sum on account of an option to purchase were paid by the defendant. The plaintiff contends that a tender was made to which defendant replied that no such tender ever was made.

Plaintiff then moves for judgment, but under the rules and facts of the case where an executory contract of sale of the land exists and nothing has been done, the case is one for the jury, therefore the rule is discharged.

No. 187, November Term, 1921.

Ejectment.

Rule for Judgment.

I. P. Knipe, Thomas Hallman and G. R. Fox, Attorneys for Plaintiff.

E. F. Slough, Attorney for Defendant.

Opinion by Miller, J., July 21, 1922.

By lease in writing and under seal between the agent of the plaintiff and the defendant, dated January 2, 1911, and duly recorded, the premises in question were demised to the defendant for a term of three years from January 8, 1911, at a rental of \$40 per annum payable quarterly in advance. The lease, which contained an amicable ejectment clause and provided for confession of judgment therein, set forth that "it is also agreed that the said Howard Bodey is hereby given the exclusive option to purchase the said piece of real estate during the term or at the expiration thereof for the price or sum of \$850." The tenant entered forthwith into possession of the demised premises.

Default having been made in the payment of rent, an amicable action of ejectment was entered on August 15, 1913, judgment therein against the defendant was confessed, and an habere facias possessionem, with fieri facias for rent in arrears and costs, was issued. This writ was stayed by the plaintiff on September 3, 1913, after the defendant had paid her all rent due, the costs and at least \$76.42 "on account of the aforesaid optional purchase price of said real estate," he having decided to exercise the option to buy. It thereupon became a contract inter partes in the sense of an absolute contract to convey on the one side and to purchase on the other (*Barnes vs. Rea*, *appel.*, 219 Pa., 279; *Barnes vs. Rea*, *appel.* (No. 2), 219 Pa., 287; *McBride's estate*, 267 Pa., 250), with the de-

Harris vs. Bodey

fendant in possession of the premises after having paid part of the purchase price thereof. Extraordinary as it seems, he has held such possession ever since, without having made any further payment of either rent or purchase money.

On January 26, 1922, the plaintiff brought this action of ejectment for recovery of such possession from him and filed her declaration and abstract of title. Defendant then, in regular course, filed his plea of "not guilty," answer in the nature of a special plea, and abstract of title and plaintiff has now entered this rule for judgment in her favor on the pleadings.

The plaintiff avers in her declaration that subsequent to January 8, 1914, she "tendered to defendant a duly executed and acknowledged deed of conveyance for said real estate in fee simple, clear of encumbrances, and demanded payment of the balance of the aforesaid purchase price of said real estate, but defendant refused then and ever since to pay the balance due for said real estate or to take title." It seems to be undisputed that the time of this occurrence was on or about May 15, 1915. Tender was necessary to have been made by the plaintiff, because, under the circumstances, she could not have called upon the defendant to perform without having actually performed, or tendered performance, on her own part.

The answer contains much that appears at this time to be irrelevant, but it denies flatly the tender mentioned and avers, to the contrary, that "about seven or eight years ago, Walter Harris, husband of plaintiff, met the defendant on the public road * * * and said to the defendant who was passing by in a wagon, exhibiting a paper, at a distance, 'I've got the deed,' did not state for what property, made no demand for payment for purchase money or any part thereof." The answer also sets up the additional defenses of estoppel because of the ejectment proceedings of 1913; election by defendant in March, 1913, to exercise his option to buy, notice thereof to plaintiff and unsuccessful tender by him of settlement, pursuant thereto; and "that the said tender and request made upon the plaintiff to make conveyance under said option has cancelled said lease and barred the plaintiff from making further claims or demands on the property so long as she neglects, refuses and fails to perform her part of said contract and also that her action should have been to enforce the performance

Harris vs. Bodey

of the optional agreement instead of an action of ejectment brought."

The application must be denied. The rule of court requires that, when a plaintiff moves for judgment for want of a sufficient affidavit of defense, he shall set forth in his motion the particulars wherein the affidavit is deemed insufficient. Since the amendment of 1915, a plaintiff in a case of ejectment should, by analogy, do no less when he seeks judgment for alleged insufficiency in the statement by a defendant as to the grounds of his defense. The plaintiff has not done so in this case and, therefore, is irregularly invoking action by the court. Such a rule should not be simply an invitation to it to act arbitrarily. *Ellis vs. Vissat, et al.*, 50 Pa. C. C., 39.

The former amicable ejectment of March, 1913, is not a defense to this action (*Jennings vs. Maley*, appel., 261 Pa., 485), but the answer raises issues of fact concerning the tender alleged to have been made by the plaintiff on or about May 15, 1915, and that of March, 1913, by defendant, as set up by him, sufficient to make it clear that the plaintiff is not entitled to judgment on the pleadings.

We might well conclude here, but the case, under its undisputed facts, is so unusual and, it may be, will be found to be fraught with so much embarrassment to both parties before they are through with it, that we have deemed it advisable to add the following observations:

The plaintiff holds but the legal title. The defendant, who had an option to buy, has made a payment on account of the contract price, is the equitable owner of the premises, and is in possession. An executory contract for a sale of the land exists between them. Many years have passed since anything has been done by either to complete the transaction and death, or some other unforeseen event, may occur at any time still further to complicate it.

The plaintiff has now brought this action of ejectment. Technically, she seeks to recover possession of the land. Ordinarily, her remedy would have been, upon making tender of a deed, to sue for recovery of the balance of the purchase money.

If a purchaser, who is in possession, defaults in making payment under an executory contract of sale of land, the vendor may, however, instead of suing for the recovery of the

purchase money, generally maintain an action for the recovery of the possession of the land. But in Pennsylvania, such an action is frequently limited to compelling specific performance of the contract by the purchaser. With us, especially in ejectment, equitable principles have long been applied on the common law side of the court. In such an action, a defendant may, at the trial, be able to show such facts as to support a request for a conditional verdict. The plaintiff may, therefore, find that the most she can ultimately recover will be the balance of the purchase money, with interest and costs.

It was stated at the bar during the argument that this the defendant has always stood ready to pay. It was intimated at the same time that the land in question has enhanced in value since the option was given. If, however, the case is tried, this fact, if it is a fact, will likely not figure. It may be the reason, even though a poor one, why the matter has been allowed by plaintiff to drift for so unreasonably long a time.

Because of the failure of her husband to join in the contract, defendant could not, of course, have had specific performance and his only remedy was to sue in assumpsit for his damages, with recovery limited to a return of the payment on account and his expenses. It is not surprising that he elected to hold possession and has never brought the suit.

And now, 21 July, 1922, rule discharged.

In the Court of Common Pleas of Montgomery County.

**Commonwealth of Pennsylvania ex rel. Samuel Goldstein
vs. Robert J. McKenty.**

The relator was found guilty of larceny and sentence was not less than two or more than four years. After he had served a little less than two years and eleven months relator by means of habeas corpus proceedings sought to be discharged, alleging that his sentence was excessive, because longer than a maximum sentence and that in the indictment no mention was made of any prior conviction that would give the Court the right to impose double the sentence, but in the case at bar the relator had not as yet served the maximum sentence which the law allows to be imposed, on a first conviction, therefore, his petition is premature and the relator must be remanded to the custody of the warden.

No. 68, June Term, 1922.

Habeas Corpus.

Francis T. Tobin, Attorney for Petitioner.

Opinion by Miller, J., July 21, 1922.

Commonwealth ex rel. vs. McKenty

The facts established at the hearing raise an issue that is much more narrow than that suggested by the petition and argument.

The relator was found guilty of larceny and receiving stolen goods at the September, 1918, sessions of the Court of Oyer and Terminer and, on September 14th, sentenced to undergo imprisonment in the penitentiary, by separate and solitary confinement at labor, for a period of not less than two, and not more than four, years from that date. The indictment did not aver his previous conviction of a similar offense, but it was shown after verdict and before sentence that in 1910 he had been found guilty of larceny and sent to Glen Mills; in 1914, to Huntingdon Reformatory, after having been found guilty of a similar offense; in 1917, to the county prison for robbery; and, in 1918, he had served ten days in jail for disorderly conduct. These four offenses had all been committed in Philadelphia county.

Ordinarily, of course, the maximum term for larceny is three years, but the relator was sentenced here under Section 182 of the Act of 1860, which provides, in substance, that, after conviction of any offense for which the punishment prescribed is imprisonment by separate and solitary confinement at labor, one who shall again be found guilty of a similar offense shall be sentenced to undergo an imprisonment and be kept at labor not exceeding double the whole period of time which may be prescribed for the crime of which he is convicted.

The point intended to have been raised by the petition for the writ was that a previous conviction of the accused had not been averred in the indictment and the record thereof had not been offered in evidence at the trial in support of that averment, wherefore, it is contended, the sentence imposed was without warrant of law and, therefore, illegal. This point is, however, purely academic at this time.

The proof adduced at the hearing showed the sentence imposed; that the relator has been released on parole from the penitentiary on September 14, 1920; that he had violated the terms of his parole and had been apprehended and recommitted on August 29th, 1921; and that he has been in confinement under the sentence since that time. He has, in

consequence, actually served less than two years and eleven months of the maximum sentence imposed and more than a month less than the maximum for a first offense of larceny. The single question now before us is, therefore, not the one propounded, but, whether, under the circumstances, he is entitled to demand his discharge at this time?

In disposing of this latter question it may be assumed, but it is not conceded, that the point which the relator has sought to raise is well taken. This does not, however, entitle him at this time to the relief for which he prays, because, prior to the expiration of that part of the sentence that the court could legally have imposed a prisoner will not be discharged on habeas corpus on the ground that the sentence is excessive. 12 R. C. L., 1209, and cases cited. This is so for the reason that his complaint is not that he is wrongfully in prison, but that the court had not jurisdiction to impose the penalty exhibited in the record. He is only entitled to relief to the extent to which his imprisonment would be unlawful. He ought not to be set at liberty until he has undergone the imprisonment which the law imposes on one committing the offense of which he was convicted: Halderman's case, 53 Pa. Sup. Ct., 554; Com. ex rel. Wilson vs. McKenty, 61 Pa. Sup. Ct., 446. The Supreme Court has, so far as known, not yet squarely decided the question, but, in harmony with the foregoing, it has recently said: "It is extremely doubtful whether habeas corpus is available to one convicted of crime, unless the record shows he had committed no criminal offense, had been pardoned, had been committed to the wrong institution, or had served the maximum sentence for his crime": Com. ex rel. Greevey vs. Reifsteck, 271 Pa., 441.

It, therefore, necessarily follows, that, as the relator has not yet served the full term of imprisonment to which he could have been unquestionably sentenced under the indictment as drawn, his application is premature and he is not entitled to be discharged. He has failed to show an illegal confinement or restraint, which is a fundamental requirement.

And now, twenty-first July, 1922, after full hearing and for the reason assigned, the relator is remanded to the custody of the defendant warden.

In the Court of Common Pleas of Montgomery County.**Henry vs. Henry.**

Libelant brought his action for divorce against respondent on the grounds of desertion. The master after due hearing filed his report recommending that a decree of divorce be granted. Whereupon the respondent filed exceptions to said report. The libelant and respondent lived in neighboring towns, the libelant for a number of years lived with his mother, who was old and feeble and a widow, and respondent agreed at the time of the marriage to live with his mother, but after being there a short time she packed her things and left, but was persuaded to return and again left the libelant, after considerable difficulty he tried to persuade his wife to come back. No effort or action on her part was taken to get her husband to establish a home other than he had, and the whole reason for her leaving is her jealous disposition of her husband's attitude for his mother as an occupant of the home without anything else is not a reasonable cause for a wife to desert her husband, and more particularly so is the desertion wilful when it is shown the husband made repeated efforts to get the wife to return.

No. 95, September Term, 1920.

Divorce—Desertion.

Maxwell Strawbridge, Attorney for Libelant.

J. Ambler Williams, Attorney for Respondent.

Opinion by Miller, J.

That the libelant is entitled to a decree on the ground of desertion, as set forth in his libel, as the Master recommends, is so clear under the testimony, all of which has been carefully read, that, in disposing of the exceptions, we might well be content merely to refer to his able report. Nothing of profit can be added to it. That which is said here is intended, therefore, not as a supplement to the report, but rather to point out a false impression under which the respondent seems to labor.

The parties, of settled age, lived in Mont Clare and Phoenixville, respectively, separated only by the Schuylkill river, and, after an uneventful courtship of three years, married on February 19, 1917. The libelant had, for years, lived with his aged, feeble, very deaf, and widowed mother in a house which she owned. Before the marriage it had been clearly understood by the respondent that such was to be her future home, she had expressed herself as satisfied with the arrangement, and it was to it that they repaired after the performance of the ceremony without any objection or protest on her part.

Both had regular employment. It may be that it was because libelant was a cripple, or, at least, had been seriously injured in one of his limbs, but, in any event, the respondent

Henry vs. Henry

had an earning capacity equal to, if not greater, than that of her husband. She soon gave up her employment.

Almost from the time of the marriage the respondent seemed to be discontented and dissatisfied. She did not fancy Mont Clare as a place of residence. She appears to have made no effort to adjust herself to the new life. She resented her husband's attentions to his mother, who was then bed-fast suffering from pneumonia. She soon developed into a chronic fault-finder. So early as April of the year of her marriage, she deserted her home without notice and without cause, while her husband was at work, and left no trace of her whereabouts. On inquiry, he finally located her and prevailed upon her to return, which she did about a week after her departure. She had taken all her belongings with her. She soon threatened again to leave and actually did so in the following June.

On June 20, 1919, while her husband was at work and his mother was temporarily absent from home, the respondent again packed up her clothing and left for good, saying to a neighbor who observed her departure that she was leaving "because she would not live in Mont Clare." She had never complained to her husband that she could not get along with her mother-in-law or asked him to establish another home; she had never declared that she was willing to live with him if he would provide a home of which his mother was not an occupant; he had, of course, never refused to provide such a home because he had not been asked to do so; the wife does not now testify that she had ever quarrelled with her mother-in-law, or that she had been treated by the latter illy or with contumely. She left the house because, as she explains, her husband "listened to his mother," of whom, it is reasonably to be inferred, she was very jealous. She never afterwards communicated with, or made any demand upon, him for support or otherwise. When he succeeded in locating her, a year later, and called upon her, she refused to return and threatened to have him arrested as a nuisance if he again called. She preferred independence and seems to have been happy in her new occupation of a dishwasher in an eating house located in an industrial town. In no view of these facts do they constitute such a mere separation

Henry vs. Henry

as denies a divorce to the husband. Such a separation must be predicated upon the consent of the wronged party, which element is totally lacking here. To the contrary, they do constitute a wilful and malicious desertion by the wife without reasonable cause. The case is easily to be distinguished from *Brenn vs. Brenn*, 45 Pa. C. C., 617, on which respondent chiefly relies.

Nor is it the law that when a wife thus deserts her husband, whether because of her unjustified dissatisfaction with her marital relations, or to accomplish some selfish purpose of her own, he, being without fault, is required to run after her and entreat her to return. Especially is such surely not the case when she is in a fair way to acquire the habit. Constancy is one of the required attributes of the married state. Fickleness and trifling are not to be encouraged. The conduct of the respondent in leaving the home is to be viewed in light of the circumstances as they existed at the time of her departure and not as she would have them appear when, more than four years afterwards, she, for some undisclosed reason, appears before the master to oppose her wronged husband's application for a divorce. Actions speak louder than words. The attempted reconciliation before the Master in Norristown is eloquent in this connection. Her promise to return to her husband was recalled by the time they had reached Phoenixville and the hearing had to be re-opened. Why she could not have lived with her husband and continued temporarily in her employment, but a short distance away, is not satisfactorily explained. Her last refusal to return is but further evidence of her permanent abandonment of him and is in keeping with her previous refusal to live with him and declaration that she wanted to be free and not tied down to any man. Her whole attitude indicates that she is controlled by influences,—that she holds convictions,—with which the law, as it is at present administered, has no concern. She deserts him and is yet unwilling that he shall have the divorce to which, under the testimony, he is clearly entitled.

In conclusion and in substance we, therefore, repeat that the mere physical presence of her husband's mother as an occupant of the home, without anything more, is not recog-

Borough of Norristown vs. Railway Company

nized by the law as a reasonable cause for a wife to desert her husband; and that, when she does wilfully and maliciously desert him without reasonable cause and for the second time in three months, he is not required to hunt for her and, if she is found, entreat her to return.

We can see nothing more in this case. The exceptions are dismissed and a formal decree of divorce will be separately entered.

In the Court of Common Pleas of Montgomery County.

**The Burgess and Town Council of the Borough of Norristown
vs. The Norristown Passenger Railway Company
and the Reading Transit and Light Company.**

Plaintiff filed its bill in equity against defendant for specific performance of an ordinance which was passed by said plaintiff. The Lansdale and Norristown Electric Railway Company were about to enter the Borough of Norristown when after an agreement between that company and Schuylkill Valley Traction Company, a predecessor of the Reading Transit and Light Company, the ordinance which is sought to be enforced was duly passed. Since the passage of the ordinance the use of the portion of the track now in question was abandoned by Lansdale and Norristown Passenger Railway Company. After an abandonment of said portion of track by the Lansdale and Norristown Electric Railway Company, the revenue received by defendant corporation was greatly reduced, in fact so much so that this portion was not self-maintaining, but there is nothing under the ordinance or under the evidence as produced that would relieve the defendant company from performing its portion of the contract, therefore, a decree for specific performance must be granted.

No. 7, April Term, 1921.

Equity.

Specific Performance of Contract.

Henry M. Brownback, Attorney for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Miller, J., March 30, 1922.

This matter came on for final hearing on bill, answers, replication and proofs.

The defendants, at the hearing, admitted the liability which is the subject matter of the first prayer of the bill and agreed at bar to perform their contracts and covenants in relation to Swede street, between Airy street and Powell street, and Powell street between Swede street and Wood street, to the approval of the complainant, commencing the work forthwith and completing the same in the spring of 1922. This disposition of these matters proved satisfactory to the complainant,

Borough of Norristown vs. Railway Company

which withdrew them from our consideration. This action left the prayer relating to DeKalb street, between Brown street and the northerly borough line, as the only specific one to engage our attention.

After hearing the evidence concerning it and arguments of counsel, we find the facts and draw therefrom the conclusions of law which follow.

FINDINGS OF FACT.

1. "The Burgess and Town Council of the Borough of Norristown," the complainant, is a municipal corporation created by special legislative enactment of the Commonwealth of Pennsylvania.

2. The Norristown Passenger Railway Company, one of the defendants, is a public service corporation duly chartered by the Commonwealth of Pennsylvania to operate a street railway system in the Borough of Norristown.

3. Reading Transit and Light Company, the other defendant, is a public service corporation duly chartered by the Commonwealth of Pennsylvania, the Norristown division of which has a trackage of 71 miles, and embraces the entire street railway system of the Borough of Norristown, including that formerly operated by Norristown Passenger Railway Company. Its gross receipts from its Norristown division for the year 1920 were \$787,211.58.

4. Pursuant to the application of Norristown Passenger Railway Company, complainant, on June 2, 1884, by ordinance duly enacted and accepted by the company, gave its consent to the latter to construct and operate a street passenger railway within the limits of the borough on and along certain streets thereof, including DeKalb street, therein named.

5. By virtue of said ordinance of June 2, 1884, Norristown Passenger Railway Company built its street railway on certain streets of the borough, including DeKalb street, northerly to Brown street, Brown street, from DeKalb street westerly to Powell street; Powell street, from Brown street to Swede street; Swede street, from Powell street to Airy street, and Airy street from Swede street back to DeKalb street, thereby forming a "loop" in the northerly end of the borough, and thereafter operated the same by horse power.

Borough of Norristown vs. Railway Company

6. Pursuant to the application of Norristown Passenger Railway Company, complainant, on October 3, 1892, by ordinance duly enacted and accepted by the company, consented, on certain conditions and stipulations to be performed by the latter, to a change of its motive power to electricity.

7. Section 5 of the ordinance of October 3, 1892, required the rails used to be flat, with at least two and one-half inches of surface.

8. On July 27, 1894, Norristown Passenger Railway Company leased all its property and franchise to Norristown, Bridgeport and Conshohocken Traction Company, now Schuylkill Valley Traction Company, a public service corporation, for a term of 999 years, which latter company expressly assumed all the obligations of the lessor to any municipality, or to the public, in any way, form, or capacity.

9. Sometime in the year 1901 there was projected an electrical street railway line to connect the Borough of Lansdale, some ten miles to the north, with the Borough of Norristown, of which town the intersection of DeKalb and Main streets was then the business centre. The new company was chartered as The Lansdale and Norristown Electric Railway Company. It desired to reach DeKalb and Main streets by entering Norristown on DeKalb street which, however, was at the time already occupied by the track of Norristown Passenger Railway Company, leased and operated by Schuylkill Valley Traction Company, from Brown street to Main street, or for all but 2200 feet of the distance from the northerly borough line to Main street.

After some difficulty and negotiations, the whole matter was finally arranged, so far as the companies were concerned, by the Lansdale and Schuylkill Valley Companies entering into a written contract, dated July 12, 1901, whereby it was agreed that the Schuylkill Valley Company should apply to town council for municipal consent to an extension of its line on DeKalb street, from Brown street to the northerly borough line; that soon as the same had been obtained, the Lansdale Company should build the extension and construct whatever paving the consenting ordinance might require; that, upon completion of both, Schuylkill should pay to Lansdale one-half their cost, whereupon the former should become the

Borough of Norristown vs. Railway Company

owner of all except the municipal improvements; that Schuylkill should furnish the power, &c., and that Lansdale should have the right, jointly with Schuylkill, to use its DeKalb street line from the borough line to Main street; that Schuylkill should assume all liability to the borough under the ordinance; and that Schuylkill should receive certain compensation for the use of its line by Lansdale.

The fact of the execution of this contract was, at the time, known to the authorities of the Borough of Norristown.

10. In consequence of the execution of the contract of July 12, 1901, and on the application of Norristown Passenger Railway Company, complainant, by ordinance, supplemental to that of June 2, 1884, and earlier supplements thereto, duly enacted on June 3, 1902, approved by the burgess on June 17, 1902, and accepted by the company, granted by way of extension the right or franchise to the company to lay its tracks and operate its road on and over DeKalb street, from Brown street to the northerly borough line; in consideration of which the company covenanted, *inter alia*:

"A. To grade and pave DeKalb Street, from curb to curb, from Fornance street" (which is southerly of Brown street) "to the northern borough line, with vitrified brick or concrete, the brick, concrete and specifications to be the same as those used in the present DeKalb street pavement south of Fornance street, and all to be subject to the borough's approval and the work to be completed within six months from the time the curb is set along the street so to be paved.

C. After the completion of said paving on DeKalb * * * street to forever keep in repair and renew the paving provided to be done by the company on DeKalb street by clause A * * *."

11. By ordinance enacted on July 15, 1902, approved by the burgess on July 28, 1902, and accepted by Norristown Passenger Railway Company, section 2, paragraph "A," of the supplemental ordinance of June 17, 1902, was, at the instance of the company, because of the lower cost of the work, amended by the complainant so as thereafter to read as follows:

"To grade and pave DeKalb street from curb to curb,

Borough of Norristown vs. Railway Company

from Fornance street to the northern borough line, with Warren's bituminous water-proof pavement under the same specifications used by the borough in other paving contracted to be done by the Warren Brothers Company; the work to be completed within six months from the time the street is to be paved; * * * provided that this change in character of pavement to be laid on DeKalb street shall in no wise impair the obligation upon the Norristown Passenger Railway Company (as provided in clause C in section 2 of the supplementary ordinance approved June 17, 1902, to which this is an amendment), to forever keep in repair and renew the roadway paving from curb to curb on DeKalb street from Fornance street to the borough line."

12. In compliance with said last above recited ordinance, and as by it directed, the Norristown Passenger Railway Company, or its then lessee, Schuylkill Valley Traction Company, did in the years 1902 and 1903, pave said DeKalb street from curb to curb from Fornance street to the north borough line with Warren's bituminous water-proof pavement. The work was actually done, however, by the Lansdale and Norristown Electric Railway Company, pursuant to the terms of its agreement of July 12, 1901, at about the same time that it constructed the extension from Brown street to the northerly borough line of the Schuylkill Valley Traction Company's DeKalb street line.

After the completion of that extension and until September 18, 1912, the DeKalb street line of the Schuylkill Valley Traction Company, from the northerly borough line to Main street, was continuously and jointly used by both companies and the Schuylkill Valley Traction Company, or its lessee, received for such use by the Lansdale Company, under the agreement of July 12, 1901, an average, annual sum slightly exceeding \$7000 in amount.

13. On or about April 1, 1910, Schuylkill Valley Traction Company leased all its property, franchises and rights, including those which it had acquired under the lease between it and the Norristown Passenger Railway Company, to Reading Transit Company, its successors and assigns, for a term of 900 years,—the latter covenanting, at its own cost, to do all

Borough of Norristown vs. Railway Company

the paving repairing and repaving of streets along which the tracks of any of the lines leased to or operated by the lessor were laid, which the lessor will be required to do.

14. In the year 1912 the Lansdale and Norristown Electric Railway Company became financially embarrassed and all its property was sold in foreclosure of the mortgage which covered it to Lehigh Valley Transit Company, one of the lines of which, then in course of construction, now extends from 69th and Market streets, Philadelphia, through Norristown and Lansdale, to Allentown. The line of the Lansdale and Norristown Electric Railway Company entered DeKalb street about six miles north of Norristown and thence continued southerly thereon. This did not suit the plans of the purchaser, whose purposes evidently were to eliminate the Lansdale Company as a competitor and at the same time to make use of portions of its right of way. It changed the line of the Lansdale Company so that it departed from DeKalb street about one and one-half miles north of the borough line, bore to the west on a private right of way and entered Norristown on Markley street, some half mile or more to the west of DeKalb street. The Lehigh Company had already made application to town council for consent to enter the town on Markley street and obtained it on June 12, 1910. The application, when made, was opposed by Reading Transit Company but was finally granted. As a consequence of the plans of the Lehigh Company, all cars from Lansdale ceased to enter Norristown over DeKalb street on September 18, 1912, and all revenue of the local company from that source under the agreement of July 12, 1901, was stopped. So nearly as can be estimated, its receipts, which can be properly credited to business obtained solely by the extension of its line northerly of Brown street, have, since September 18, 1912, averaged about \$700 per year.

All trackage was, promptly after the failure of the Lansdale Company, removed from DeKalb street, for a distance of one and one-half miles northerly of the borough line and that thoroughfare, now a state highway, is paved with concrete.

15. On or about April 1, 1913, Reading Transit Company assigned to Reading Transit and Light Company, one of the

Borough of Norristown vs. Railway Company

defendants, all its rights as lessee under it sub-lease of April 1, 1910, above recited, which said assignee thereby assumed all the obligation and covenants of the assignor.

16. Pursuant to said assignment, the assignee took over the possession of the property of the Norristown Passenger Railway Company and its lessees and, ever since, has been, and is now, operating it as a part of its trolley system in Norristown, subject to the provisions and stipulations of the above recited ordinance of June 2, 1884, and its several above recited supplements and amendments.

17. By ordinance enacted December 1, 1914, approved by the burgess on December 4, 1914, and duly accepted, the complainant, at the request of Reading Transit and Light Company, one of the defendants, amended Section 5 of the ordinance of October 3, 1892, so as to make it read:

"The Norristown Passenger Railway Company and its successor, Reading Transit and Light Company be and they hereby are authorized and permitted, in the reconstruction of their railway, or any part thereof, to substitute for the present rails an improved type of rail known as 'Trilby Girder Rail,' or some other type of rail similar in section and weight."

When any such substitution is made, the companies are required, by section 4 of the ordinance, to "pave * * * with wood block the space between their tracks wherever the balance of the said street is paved with Warren Macadam."

By this amending ordinance the improved type of rail was to be laid on DeKalb, from Airy street to the north borough line. The substitution has not yet been made on DeKalb street, north of Brown street.

18. By ordinance, duly enacted September 5, 1916, approved by the burgess on the same day, and accepted by Norristown Passenger Railway Company and Reading Transit and Light Company, the complainant, at the request of the Reading Transit and Light Company, amended section 4 of the amendatory ordinance of December 1, 1914, so as to make it read as follows:

"As and when either the Norristown Passenger Railway Company, or its successors, the Reading Transit and Light Company, makes repairs on its rights of way upon

Borough of Norristown vs. Railway Company

the streets aforesaid, they shall pave with vitrified brick the space between the tracks and for one foot on each side thereof; provided that this ordinance shall not in any other respect nor to any other extent alter or impair the duties, obligations and liabilities of the aforesaid corporations, or either of them, under the aforesaid ordinances."

19. Motor vehicle traffic on DeKalb street from Brown street to the north borough line, which is the second principal street of the borough, has greatly increased in recent years, while such traffic by horse-drawn vehicles has correspondingly diminished. The wear and tear of the former on the pavement is much the harder. Observations made on three consecutive days, commencing with October 21, 1921, showed a daily average of vehicles passing over this section of street of 1007, of which 995 were motor driven.

20. About twenty passengers per day, on an average, enter or leave the cars of Reading Transit and Light Company between Brown street and the north borough line, which is now the northerly terminus, or dead end, of its DeKalb street line. This may be partly due, however, to the fact that it operates but one car an hour beyond Brown street. There has been a considerable increase, in recent years, in the number of dwelling houses erected in the vicinity of DeKalb street and the borough line and along DeKalb street, northerly of Brown street.

21. As already found, DeKalb street, from Brown street to the northerly borough line, a distance of about 2200 feet, was paved from curb to curb with Warren Bituminous Waterproof pavement at the instance of Norristown Passenger Railway Company, or its lessee, Schuylkill Valley Traction Company. The contractors were required to keep this pavement in repair for ten years after its completion and it is assumed that they did so.

Its structure consisted of a 4" deep, heavily rolled trap rock, 1½" to 2", base, covered by a thin layer or bond of cement on which was placed the Warren heated, semi-liquid, mixture, whose ingredients were crushed stone, asphaltum and bitumen to a depth of 2½" to 3". This was then cov-

Borough of Norristown vs. Railway Company

ered with a sprinkling of fine broken stone, rolled and allowed to harden or solidify. It is a durable street pavement extensively in use by cities and towns.

The street is open to public travel and this pavement is in constant use now, nearly twenty years after it was laid.

The defendants have never repaired it since it was put down. About a year ago the plaintiff made a few minor repairs to it, that could not be longer delayed, at a cost of \$70.66 and sent the bill therefor to Reading Transit and Light Company which paid it under protest.

The whole pavement in question is admitted by defendants to be in bad condition. Between the curbs and their single track in the middle of the street it is filled with deep pot holes; it has buckled in many places; the entire surface is worn out; and it is generally in an unsafe, uneven condition.

The track has received little, if any, attention since it was laid. The ties are decayed or cut; the rails are worn out and uneven; the spikes are loose and many project above the pavement; and, because of its neglect, the pavement between the rails, and for some distance on either side, has fallen in and broken, so that it is not convenient or even safe for use by vehicles. DeKalb street, northerly to Brown street, and northerly of the borough line, is finely paved. This intervening stretch of 2200 feet is unsightly, unsafe and utterly neglected.

22. The complainant, commencing with formal notices in the spring of 1918, has repeatedly notified the Reading Transit and Light Company to make repairs to this section of street as it is required to do by the ordinances above recited. It has, at various times, ignored the notices; plead lack of funds; or flatly refused to do the work, which remains unperformed. The condition of said street is growing steadily and rapidly worse.

23. The condition of the pavement of this section of street is such at this time that, between the trolley rails in its centre and for one foot on the outside of each rail, it should be replaced by a new pavement, which cannot be satisfactorily laid until after the trolley track, including rails, ties, &c., is renewed; and, from this 8' wide strip in the middle of the street to the curb on either side, a new pavement should also be laid; although, as to the latter, if the pavement in the

Borough of Norristown vs. Railway Company

middle of the street is renewed, temporary repairs, consisting of leveling, filling up holes, and re-surfacing the old base, may put the sides of the street in reasonably safe condition for public travel for some years.

The track and pavement have been so long neglected and have fallen to so low an estate that the defendants estimate that their complete and proper renewal will cost, depending upon the character of pavement used, of from \$46,954.50 to \$54,084.25, of which \$11,111 represents track renewal, but the only witness who testified on this subject said that he did not know today's prices and was guided by the company's last purchases. Not much reliance can safely be placed on his estimates. He testified, however, that "the thing which is the cheapest to the party that has to maintain it (the pavement) is to rebuild the entire street from curb to curb."

24. On October 31, 1921, the day before the hearing, the corporators of Norristown Passenger Railway Company met and, after reciting this pending suit in equity, consented that the company should apply by petition for permission to surrender its power to construct and operate its line of street railway in and upon DeKalb street between Brown and the borough limits.

At the final hearing, on the following day, counsel for the company stated that it was intended to present the application soon as it could be prepared and it was agreed that this case should be held to afford reasonable opportunity for them to do so.

No such application has since been presented and it is now understood by the court that the matter has been abandoned.

25. The complainant asks for a decree requiring the defendants, or either of them, specifically to perform their contracts and covenants in the aforesaid ordinances contained and at once to repair and repave the whole width of DeKalb street from curb to curb, between Brown street and the north borough line, with Warren's Bituminous Water-Proof Pavement, or with a pavement of equal quality and durability, as the council of the borough may determine, and to pave with vitrified brick, between the rails and for one foot outside each rail of its track.

Borough of Norristown vs. Railway Company

From the facts as thus found, we draw the following

CONCLUSIONS OF LAW.

1. The court has jurisdiction.

2. Norristown Passenger Railway Company became obligated by the amendatory ordinance of July 15, 1902, forever after the completion, in 1903, of the Warren Bituminous Water Proof Pavement on DeKalb street, between Brown street and the northerly borough line, to keep it, from curb to curb, in repair and to renew it when required, which obligation was afterwards assumed by Reading Transit and Light Company.

3. The amendatory ordinance of September 5, 1916, requires the defendants, when they make repairs to their right of way on DeKalb street, between Brown street and the northerly borough line, to pave with vitrified brick the space between the tracks and for one foot on each side thereof.

4. On the facts as found, especially in the absence of any complication in the case that might have been caused by an application for a surrender of the franchise on the section of street in question, and under the settled law, the complainant is, in our opinion, clearly entitled to a decree.

5. A street railway company's financial embarrassment, or the fact that a relatively small portion of its total lines in a municipality may be operated at a loss, constitutes no legal excuse for its failure to perform its contract with the municipality for street improvements along the unprofitable portion of its lines.

6. The defendants shall, within three months after final decree and subject to the qualification set forth in our next conclusion, repair and repave the whole width of DeKalb street from curb to curb, between Brown street and the northerly borough line in the manner specifically provided for in the ordinance of July 15, 1902.

7. Should the defendants elect to repair their right of way on said section of street at or about the same time when such repair or repaving is done, it is further ordered and decreed that, within the same period of time, they shall pave the space between their tracks, and for one foot on each side thereof, with vitrified brick (instead of making the repairs to, and

Greth vs. O'Byrne

doing the repaving on, such space, having a total width of eight feet, required by our last conclusion), as specified by the ordinance of September 5, 1916.

8. The defendants shall pay the costs.

And now, 30th March, 1922, after final hearing and mature consideration, it is ordered, adjudged and decreed that the Prothonotary mark these findings of fact and of law filed, thereby to become a part of the record in the case, and enter a decree nisi in accordance therewith.

The Prothonotary is further directed to give notice to counsel in the case, as required by the rules of equity practice, and that, unless exceptions thereto are filed within ten days of this date, a final decree will be entered by him in accordance with the foregoing conclusions.

In the Court of Common Pleas of Montgomery County.

Greth vs. O'Byrne.

Plaintiff brought his action of replevin against defendant to recover certain articles of furniture. The jury returned a verdict for plaintiff, whereupon defendant made a motion for a new trial on the grounds that there was no evidence to sustain the verdict in so far as the victrola was concerned. In his affidavit of defense defendant claimed title, while at the trial his wife claimed title. In an action of replevin the defendant must establish his title and cannot depend on the weakness of plaintiff's title, and as the wife did not ask leave to intervene. Motion for a new trial must be denied.

No. 125, June Term, 1920.

Replevin.

Motion for new trial.

Maxwell Strawbridge, Attorney for Plaintiff.

I. P. Knipe, Attorney for Defendant.

Opinion by Miller, J., January 3, 1922.

The action is replevin; the property involved consists of a large number of items of second-hand household furniture; and the verdict was for the plaintiff as to all, fixing the value of the goods at \$300 and the damages for their detention at \$10. The defendant moved for judgment non obstante verdicto and a new trial and later filed additional reasons to support the latter. He afterwards withdrew the motion for judg-

Greth vs. O'Byrne

ment and all the reasons for a new trial except two, at the same time limiting their application to a single item of the furniture—a victrola;—so that the only matter left to be disposed of is his application for a new trial because, as to the victrola, as he contends, “there was no evidence to sustain a verdict for the plaintiff.”

In order intelligently to dispose of the motion we must first look at the record and the pleadings. They disclose that John F. O'Byrne, and not his wife, Elizabeth, is the defendant in the action. While the writ is lost, it is assumed that the sheriff made the usual return, because the defendant, then claiming property to be in himself, promptly gave a claim property bond, and retained possession.

Later, in his affidavit of defense, the defendant declared that the victrola in question had been presented to his wife by the father of the plaintiff and that she was its owner. Under the pleadings the issue as to the victrola was, however, which of the parties to the suit was entitled to its possession, when the writ was sued out? The wife made no application for leave to intervene and never filed a counter bond.

To maintain replevin the plaintiff is required to show not only property in himself, but the right to possession (*Weideman vs. Ricker*, 44 Pa. Sup. Ct., 85); and could recover only on the strength of his own title, not on the weakness of his adversary's (*Reinheimer vs. Hemingway*, 35 Pa., 432; *Swope vs. Crawford*, 16 Pa. Sup. Ct., 474). Therefore, proof of a good title in a third person will defeat the plaintiff as well as proof of a good title in the defendant himself (*Strauss vs. Reen*, 17 Phila., 89; *Johnson vs. Groff*, 22 Pa. Sup. Ct., 85). When a defendant in replevin pleads property, the title of the plaintiff is put in issue and the action cannot be maintained without showing either a general or special property in the plaintiff, together with the right of immediate possession. If, upon the whole evidence, the plaintiff fails to establish these essential facts, to the satisfaction of the jury, he is not entitled to recover (*Swope vs. Crawford*, *supra*). Did the plaintiff, in his proofs, measure up to these requirements?

The proof in support of the plaintiff's title was to the effect that his father, who had lost his wife and never remarried, had purchased the victrola in 1913 and had it placed in the

Greth vs. O'Byrne

parlor of the home of a Mrs. Lawson, in which he was then a boarder; that, later, the father went to house-keeping and had it removed to his own home; that he then broke up house-keeping and went back to Mrs. Lawson's, in the parlor of whose home it was again placed; and that, in November, 1916, he had changed his boarding place to the home of Mr. O'Byrne, the defendant, where his victrola was placed in the parlor, and he remained until his death on February 25, 1920.

Mr. Greth had three adult sons, of whom Paul, the plaintiff, lived with his father from the son's return from the service in May, 1919, until the father's death. He continued to board at O'Byrne's and occupy his father's room after that event and until the summer of 1920, when, because of Mrs. O'Byrne's poor health, he was compelled to find another boarding place. When the father died his rooms at the O'Byrne house contained certain furniture, which, with the victrola, he had brought to the premises. After his death, by arrangement with his brothers, plaintiff became the owner of all such property that had belonged to his father when he died. When upon his leaving the O'Byrne boarding house, the plaintiff sought to take the contents of his father's room and the victrola along with him, the O'Byrnes refused to surrender them and claimed to own all by gift from the father, Greth, during his lifetime. Not a single item of this evidence was in anywise controverted by the defendant and it was sufficient to support a verdict in favor of the plaintiff.

The only defense was that when Mr. Greth, the father, died, he did not own the victrola, because, during his lifetime, he had, as already stated, given it to Mrs. O'Byrne, and, to substantiate it, a Mrs. McGovern, sister of the defendant, testified that Mr. Greth had, in his lifetime, declared to her that it was not his, because he had given it to Mrs. O'Byrne; a Mr. Kelso said that the decedent had stated to him that it was Mrs. O'Byrne's and, when someone wanted to borrow it, he had heard Mr. Greth say to the applicant that he had nothing to do with it; a Mrs. McGovern testified that he had said to her: "The victrola will never be taken away. I have given it to Mrs. O'Byrne"; and Mary O'Byrne, daughter-in-law of defendant, testified that, just before he died, Mr. Greth had told her that the victrola belonged to her mother-in-law.

Greth vs. O'Byrne

From November, 1916, until the death of Frank Greth, the father, on February 25, 1920, this victrola had remained where it was first placed, in the O'Byrne parlor, where it had been used and enjoyed by the decedent and the family generally.

This oral testimony consisted entirely of alleged loose declarations made by a man now dead to the relatives and friends of the defendant. There was no direct evidence to prove the fact of the gift itself. Unless the testimony offered was believed by the jury and found by them to be clear, satisfactory and convincing (Smith's Estate, 237 Pa., 115, 118), the defense fell. They saw the witnesses on the stand and were in a position to judge their credibility. Their verdict indicates either that they did not believe it, or that, in their opinion, it failed to measure up to the standard of proof required by law to establish a gift inter vivos after the donor is dead. It is not our province, or pleasure, to usurp their function. They were carefully charged as to their duties and no fault is found with the charge. We have none to find with the verdict.

And now, third January, 1922, the motion for a new trial is overruled, the reasons are dismissed and the prothonotary is ordered to enter judgment in favor of the plaintiff and against the defendant on the verdict upon payment of the verdict fees.

In the Court of Common Pleas of Montgomery County.**Newall et al. vs. Montgomery Transit Co. et al.**

Plaintiff filed its bill in equity as holder for certain bonds against the defendant corporation and the trustees under said bonds for the appointment of a receiver. The defendant's answer to said bill sets forth that the bonds under which the plaintiff claimed the right to ask for the appointment of a receiver were illegally issued, and were not the bonds of the said defendant corporation, but evidence was also produced that the interest on the first mortgage bonds was in default, and that the corporation was insolvent. It is well established that the Court has a right to appoint a receiver of an insolvent corporation, therefore, the plaintiffs are entitled to have their petition granted, and have a receiver appointed.

No. 3, November Term, 1921.

Equity.

Appointment of a Receiver.

D. Yeakel Miller and L. L. Smith, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendants.

Opinion by Swartz, P. J., June 27, 1922.

The complainants filed this bill for the appointment of a receiver, for the said Montgomery Transit Company.

They allege that the said Company is insolvent and that it is necessary to appoint some competent person to take charge of and preserve the assets of the corporation.

The Montgomery Transit Company answers that the plaintiffs are not the holders of any valid obligations against the said corporation and that the Company is not insolvent unless certain outstanding bonds, fraudulently misappropriated, are valid claims against the corporation. It also answers that there is no necessity for a receiver and that the expense would be a waste of assets.

FINDINGS OF FACTS.

1. The Montgomery Transit Company was organized in 1911, to operate a street passenger railway, in the County of Montgomery. It is the successor of the Montgomery County Rapid Transit Company.

2. On December 1, 1911, the Montgomery Transit Company mortgaged all its franchises and properties to the Norristown Trust Company, trustee, to secure the payment of certain bonds of the face value of \$150,000. These bonds are still outstanding and unpaid and the interest is now in de-

fault to the amount of \$9,750. That sum was due and unpaid on June 1, 1922.

3. On October 2, 1916, these bonds were held, personally, by four of the directors of the Montgomery Transit Company. They were sold to them on January 10, 1916, for the gross sum of \$130,000, to protect the purchasers for liabilities incurred on behalf of the Company. On October 2, 1916, the said holders and owners sold all of the bonds to W. R. Edelman and Company and W. R. Edelman for the sum of \$130,000, the purchase money to be paid within one year, if the time was not extended.

The capital stock of the Company consisted of 3200 shares of the par value of \$50 each. All the stock was issued and sold by the Company, except 32 shares.

4. This agreement of sale of the bonds by the four persons, also included a contract made by them, in behalf of the Montgomery Transit Company with the said W. R. Edelman and Company and W. R. Edelman. The four directors, acting in behalf of the said company, are designated as the party of the first part and W. R. Edelman and Company and W. R. Edelman are named as the party of the second part.

(a) The party of the first part agreed to deliver to the party of the second part a majority of the outstanding capital stock of the Company, to consist of at least 1601 shares, for which the party of the second part was to pay \$15 per share. The party of the second part was to pay \$1,000 at the execution of the agreement, on account of the said purchase money.

This majority of the stock was to remain in hands of the Norristown Trust Company, as the depository, until the party of the second part made final payment for the same.

(b) The agreement provided for "the rehabilitation and extension of the plans of the company."

The party of the second part was to pay into the hands of Daniel M. Anders, the treasurer, the sum of \$15,000, to be expended upon rolling stock and the improvement of the present road, or in lieu thereof put in operation two modern type cars.

(c) The improvements, extensions and operation of the road were to be conducted under an executive committee of three to be appointed by the present board of directors; two

Newall et al. vs. Transit Company

members of this committee were to be selected by the party of the second part. The management of the Company was to be subject to the discretionary power and direction of the second party, through the executive committee.

New directors were to be chosen, the board to consist of five members, three to be selected by the party of the first part, and two by the party of the second part.

The actions of the executive committee were to be approved by the board of directors at its regular monthly meetings.

(d) Upon the payment of the amounts specified for the majority stock the party of the first part agreed to turn over such resignations of the officers and directors of the Company as the party of the second part may request.

(e) The contract also provided that the road should be extended from Harleysville to the borough of Souderton and from same point, on the road, another extension should be made toward Greenlane, Red Hill, Pennsburg and East Greenville.

(f) To provide funds, the capital stock was to be increased from \$160,000 to \$250,000. A first and refunding mortgage of not less than \$500,000 was to be issued. The said bonds should be used as follows: \$175,000 to take up and discharge the existing mortgage of \$150,000; \$75,000 for the extension from Harleysville to Souderton; for the immediate equipment and improvement of the road, \$20,000; for the extension of the road toward Greenlane, Red Hill, Pennsburg and East Greenville, \$230,000.

(g) The bonds to the amount of \$175,000 were to be deposited with the trustee under the refunding mortgage. They were to be sold at not less than 85½ per centum, and the proceeds of sale were to be applied in payment of the bonds of \$150,000 held by the party of the first part.

The party of the second part was to pay the interest on the \$150,000 first mortgage bonds and all state and other taxes assessed against the mortgage and bonds.

4½. The party of the first part obtained from the stockholders certificates of stock for 1601 shares. They were deposited with the trust company, as provided in the contract,

just defined, and the party of the second part paid the agreed price and received the stock.

5. On October 4, 1916, the party of the first part carried out the terms of the agreement relating to the resignations from the board of directors. At the meeting held on that day two of the directors resigned, and W. R. Edelman and C. Mervin Graham were elected to fill the vacancies. The board now consisted of Alvin C. Alderfer, John F. Lederach, Daniel M. Anders, W. R. Edelman and C. Mervin Graham.

6. On October 4, 1916, Daniel M. Anders and Alvin C. Alderfer resigned as members of the executive committee and W. R. Edelman and C. Mervin Graham were elected to fill the vacancies. The executive committee was then composed of John F. Lederach, W. R. Edelman and C. Mervin Graham.

It then consisted of one member selected from the first party and two from the second party, in compliance with the sale agreement of October 2, 1916.

7. At a stockholders' meeting held on February 17th, 1916, a bond issue was authorized to the amount of \$600,000. The loan was termed a First and Refunding Mortgage, thirty years Gold Bonds.

The Norristown Trust Company was made the trustee, under the mortgage.

All bonds were to be signed by the president of the Montgomery Transit Company and attested by the secretary. The bonds were not to be binding unless authenticated by the certificate endorsed by the trustee under the mortgage.

This mortgage was executed to the Norristown Trust Company, on February 19, 1917.

8. We find no evidence, unless inferentially, in the minutes of the Transit Company, giving to the four directors any authority to act in behalf of the Montgomery Transit Company in making the agreement of October 2, 1916, with W. R. Edelman and Company and W. R. Edelman. The contract vested in the party of the second part very extensive powers because the majority of the executive committee was to be selected by the second party. "The management of the Company was to be subject to the discretionary power and direction of the party of the second part through the executive committee."

Newall et al. vs. Transit Company

True, the actions of the executive committee were to be approved by the Board of Directors, at their monthly meetings. The meetings of the directors, however, were so few and far apart, that the right of approval could not be exercised with any proper supervision, nor was it, in fact, exercised.

The Board of Directors, on February 19, 1917, waived the supervision given to them under the contract of October 2, 1916, by resolving, that the transaction of any and all business pertaining to the Company be placed in the hands of the executive committee, until the day of June, 1917. True, the stockholders at the annual meeting were accustomed to pass a resolution approving and ratifying all the acts and conduct of the directors and officers of the Company performed during the past year. Even this confirming resolution does not appear, before January 8, 1918.

Meetings of the board of directors were held on February 19, 1917, and in June, 1917. The next meeting of the board, according to the minutes, was not held until November 25, 1919; this was followed by a meeting on May 10, 1920.

9. A contract was made by the Montgomery Transit Company with the Philadelphia Construction Company for the extension of the railway line. The contract was not produced. It is lost, or in unknown hands. Its terms are not disclosed by the testimony. Admittedly the Construction Company was to carry out the building of the extension agreed upon by the directors on October 4, 1916. The stockholders' meeting, on February 17, 1917, authorized the First and Refunding Mortgage of \$600,000 to raise the funds necessary to pay for such extension.

The Philadelphia Construction Company was W. R. Edelman.

10. That such contract was made is evidenced by two resolutions passed by the Board of Directors on February 19, 1917. The first reads as follows: "Resolved, that the proper officers of the Company be and are hereby authorized to enter into a contract for the construction of extensions of the present property of the Company and to contract for new equipment for the use of the Company, with the Philadelphia Construction Company, in substantially the manner and form, as submitted by the secretary of the company and hereby ap-

MONTGOMERY COUNTY

Newall et al. vs. Transit Company

proved by the board of directors, and the secretary of the company and the proper officers of the company are hereby directed to take any and all steps necessary and incident to putting the said contract into effect and their action in so doing is hereby ratified and approved."

The second resolution reads as follows:

"Resolved, that the treasurer is hereby authorized to turn over and deliver to the contractor, under the said contract, or his nominee, any or all of the said bonds known as the First and Refunding Mortgage Bonds of the Company, as the same are requested by the said contractor or his nominees, and his action in so doing is hereby ratified and approved."

All the directors of the board were present at this meeting. All signed the call for the meeting and it was by waiver, held on the same day it was called.

11. These resolutions were passed by a unanimous vote of the board of directors. The board then consisted of Daniel M. Anders, Alvin C. Alderfer, John F. Lederach, C. Mervin Graham and W. R. Edelman. Daniel M. Anders was the secretary of the board and the treasurer of the Company.

The three old members of the board were in the majority. They also constituted three of the four directors who were the party of the first part in the agreement of sale of October 2, 1916, made with W. R. Edelman & Company.

12. On the same day, February 19, 1916, the board by unanimous vote passed two resolutions. The one directed the Norristown Trust Company, the trustee under the First and Refunding Mortgage to deliver to the treasurer of the Company bonds to the amount of \$30,000. The other directed a delivery to the treasurer of \$75,000.

These resolutions preceded the one that on the same day authorized the treasurer to turn over and deliver the bonds to the contractor.

13. In June, 1917, the board of directors by two resolutions directed the said Trust Company to deliver to the treasurer of the Company bonds to the amount of \$220,000.

Daniel M. Anders, W. R. Edelman and C. Mervin Graham were the directors present at this meeting.

14. The minutes of February 19, 1917, contain a general order for the delivery by the trust company to the treasurer

Newall et al. vs. Transit Company

of the Transit Company bonds aggregating \$365,000. To what extent this amount covers the subsequent resolutions does not clearly appear. There is an apparent discrepancy between the records of the trust company and the minutes of the Transit Company. There is no doubt that the trust company certified and delivered the bonds to the treasurer of the Transit Company as disclosed by the books of the trust company.

15. Resolutions of the Transit Company for the certification and delivery of bonds to its treasurer were filed with the trust company as follows: February 19, 1919, for bonds amounting to \$30,000; February 20, 1917, for \$100,000; May 21, 1917, for \$75,000; June 23, 1917, for \$100,000; July 21, 1917, for \$120,000.

The treasurer, Mr. Anders, and the president, Mr. Graham, were present in person at the trust company and receipted for the bonds. Mr. Graham took them away and delivered them to W. R. Edelman.

The trust company was duly authorized to certify and deliver the bonds by resolutions of the directors of the Transit Company certified to the Trust Company.

16. The bonds so certified and delivered amount to \$425,000.

The holders of these outstanding bonds to the amount of \$225,000 deposited the same with the Pennsylvania Company for Insurance on Lives and Granting Annuities, under an agreement whereby a committee of the bondholders was to act for the mutual protection of the owners.

17. It is admitted that the plaintiffs and their counsel represent holders of these outstanding bonds aggregating over \$190,000, or more than 40 per centum of the total amount of the \$425,000 certified by the trust company. These owners of the bonds are innocent holders for value so far as there is any evidence before us.

The obligations were duly authorized and created by the stockholders of the Transit Company and were issued in compliance with the resolutions of the board of directors.

They were delivered into the hands of W. R. Edelman, who was to sell them and apply the proceeds in building the extensions of the route and in the equipment of the existing road.

If the money was misapplied by the party authorized to dispose of them, they were not thereby invalidated in the hands of the purchasers. There was no requirement in the mortgage or bonds that buyers must look after the application of the purchase money.

18. The interest on these bonds is in default for some years. Some coupons were paid, apparently by Mr. Edelman. No money was deposited by the Transit Company or any other party to meet the payment of the coupons as they matured. Some were paid directly by Mr. Edelman, but the Trust Company refused to accept small sums from him to honor part of the coupons. It refused to create a preference by such payments.

19. Admittedly the Montgomery Transit Company is insolvent if these bonds and accompanying coupons are a valid claim against it. It is in default in the payment of interest on the first mortgage of \$150,000. The receipts over expenditures in operating the road did not provide sufficient funds to pay the arrearages of interest on the \$150,000. Much less will receipts satisfy the defaulted interest and accruing interest on the First and Refunding Mortgage.

20. It is contended that Mr. Edelman, the seller of the bonds and contractor to build the extension was to provide the interest for the First and Refunding Mortgage, until the extension was completed and the road in operation over such extension.

The contract is not before us, but even if it contained any such agreement there is nothing in the mortgage or bonds to notify the purchasers of any provision of that character. On the contrary the mortgage and bonds contain the covenant and promise, that the Transit Company will pay these coupons.

21. The three directors who now constitute the board and operate the road were the majority directors when the mortgage was created and when the bonds were certified and delivered to Mr. Edelman by the resolution of the board. Mr. Lederach, one of the present board, was a member of the executive committee when the bonds were delivered and when the proceeds were to be applied to pay the cost of the extension.

Newall et al. vs. Transit Company

Not one dollar of the proceeds from the sale of the bonds reached the treasurer of the Transit Company.

Practically, the Company has nothing of value in consideration for the bonds now outstanding, amounting at least to \$225,000, and may aggregate \$425,000, as bonds to that amount were certified and delivered to Mr. Edelman.

Some grading was done, but part of the expense incurred in this work was paid out of the operating receipts of the Company. The value of this grading is not given but it is evident that it constitutes a very small sum compared with the obligation incurred in issuing and delivering bonds to the amount of \$425,000.

22. Before the board of directors ordered the last bonds to be issued, certified and delivered to the contractor, no inquiry was made as to the application of the proceeds derived from the bonds certified and delivered to Mr. Edelman five months before that date. Mr. Edelman never accounted to the board or to the executive committee for the sale of the bonds and the amounts realized, nor was he asked to do so, so far as there is any evidence before us. The actions of the executive committee through whom the work was to be supervised were not reported to the board of directors and no meetings were held by the board to approve or disapprove the action of the executive committee.

The contractor received all the bonds issued to meet the costs of the extension before any material part of the work was performed. Even the trolley rails placed along the line of the extension were removed by the contractor and the proceeds of their sale went into his hands.

23. We do not mean to intimate that the three directors now operating the road, or any one of them, acted in bad faith, or that they are liable to the Company for the losses it sustained. They trusted W. R. Edelman and those under his control and were deceived. The question may also arise whether the stockholders of the Company did not authorize them to do all that was done by them in relation to these bonds amounting to \$425,000.

We deemed it necessary to set forth these findings in view of the contention that there is no necessity for a receiver because "the operation of the road is in the hands of the three

competent men named." No doubt they are doing the best they can with the road, under all its embarrassments, but the history of their transactions from 1916 to 1918 is before us and forms a part of the essential facts in support of the application for a receiver.

24. The trustee under the First and Refunding Mortgage is also the trustee under the First Mortgage of \$150,000. Because of this situation the trustee expressed a desire that the attorney for the holders of bonds under the second mortgage should proceed to collect the bonds in behalf of his clients. The trustee, however, gave the Transit Company the required notice of the default under the second mortgage.

DISCUSSION.

There is no dispute as to the facts in the case. We set them forth, so fully, in our findings, that any further discussion relating to them is needless.

That the bonds secured by the First and Refunding Mortgage are valid obligations of the Montgomery Transit Company can not well be gainsaid. The misconduct of W. R. Edelman, who is now in jail for certain fraudulent acts, not connected with these bonds, can not be set up against the holders of these Thirty-Year Gold obligations.

The evidence submitted to the Court does not impeach their validity against the Transit Company. It is presumed that one who is the holder of a corporate bond payable to bearer is a holder for value and the burden of proof is upon those who contest this presumption; *Mason vs. Frick*, 105 Pa., 162. This is true even if the bonds were stolen.

The bona fide purchaser for value, before maturity of a bond payable to bearer is protected; *Cochran vs. Fox Chase Bank*, 209 Pa., 34.

That the Company is insolvent if these bonds are valid is self-evident from the testimony before us, and the fact was admitted, at the argument, by counsel for the defendant Company.

But the bill also alleges that it is absolutely essential to the preservation of the assets of the company, that some competent person should be appointed to preserve the assets of the Company.

Newall et al. vs. Transit Company

The evidence shows that the Transit Company, during the administration of its affairs, has incurred heavy obligations which it is unable to meet, and for which the Company received no substantial value.

A receiver, if appointed, will, in the performance of his duties, investigate the circumstances occasioning this serious loss.

It is manifest that those now in charge of the affairs of the Company could not be expected to bring any proceedings to enforce the rights and interests of the creditors, should it be disclosed that it is necessary to bring suit against any one who participated in said management when the loss occurred.

We do not mean to intimate that such investigation will disclose any personal liability on part of any one other than W. R. Edelman and those who may have aided him in what appears to be a scheme to defraud the Company.

This condition offers an additional ground for the appointment of a receiver.

W. R. Edelman, during the time he was a director of the Company, misappropriated its assets. This is clearly indicated by the evidence. Insolvency and misappropriation of the assets of the Company are always recognized as sufficient grounds for the appointment of a receiver, upon the filing of a creditor's bill; Cyc., Vol. 34, page 57.

A receiver will be appointed in behalf of the mortgage bondholders when the interest on the bonds is long unpaid, and when it is apparent that the mortgaged property will not bring sufficient to satisfy the indebtedness; High on Receivers, page 476 (4th Edition). The duty of the Court to appoint a receiver for an insolvent corporation, under the facts disclosed in this case, is well established; Blum Bros. vs. Girard Bank, 248 Pa., 155; Power vs. Grogan, 232 Pa., 394.

It is contended that the receiverships are expensive and that, therefore, the appointment should not be made as prayed for.

This argument could be advanced against an appointment in any case. But in this application the reasons for the appointment are fully supported and the attending expenses of a receivership cannot be avoided.

Counsel for the plaintiffs does not, at this time, ask for

Newall et al. vs. Transit Company

any relief other than the appointment of a receiver. An application for a sale, or for a foreclosure, may follow.

We can do no more than appoint a temporary receiver, because it does not follow that all parties interested, including creditors and stockholders, had notice of the pending proceeding.

The parties will submit a decree at the proper time.

CONCLUSIONS OF LAW.

1. The bondholders under the First and Refunding Mortgage of the Montgomery Transit Company are creditors of the said Company, under the facts found. But this is not a proceeding wherein that question can be raised.

2. The Montgomery Transit Company is insolvent.

3. It is necessary that a competent person or persons should be appointed receivers of the Company for the collection and preservation of the assets of the corporation.

4. The plaintiffs and the other creditors in whose behalf the bill was filed are proper parties to ask for a receiver.

And now June 27, 1922, it is ordered, adjudged and decreed that the foregoing findings and conclusions be filed in the office of the prothonotary, who will give notice forthwith of such filing to all parties on the record or their counsel, if any, and he will enter a decree nisi, that a receiver be appointed for the Montgomery Transit Company. If no exceptions are filed, within the time required by the equity rules, he will enter a final decree as of course accordingly.

In the Court of Common Pleas of Montgomery County.**Borough of Jenkintown vs. Philadelphia Rapid Transit Co.**

Plaintiff brought suit to recover costs of repairing certain streets which defendant's predecessor had by ordinance agreed to do. Defendant filed its affidavit of defense alleging that the Court did not have jurisdiction but that full power lay with the Public Service Commission; also that consent of the Borough is not necessary where the original right of way was purchased from a Turnpike Company. Plaintiff then moved for judgment for want of a sufficient affidavit of defense, the Court held that any action on a contract made prior to 1913 is within the jurisdiction of the Court of Common Pleas and further that no matter who owned the bed of the street a borough has the right to control by ordinance the manner in which entry shall be made, therefore, judgment must be entered for plaintiff.

No. 38, Feb. Term, 1922.

Assumpsit.

Motion for judgment for want of sufficient affidavit of defense.

Evans, High, Dettra & Swartz, Attorneys for Plaintiff.

Larzelere, Wright & Larzelere, Attorneys for Defendant.

Opinion by Swartz, P. J., July 1, 1922.

Nearly all the defenses set up in this affidavit were considered by the Court on the defendant's motion raising questions of law, as to the sufficiency of the plaintiff's statement.

We shall not repeat what we said in our opinion. The decision was filed on May 22, 1922, and is made a part of this opinion. (See 38 M. L. R., 121.)

The question of liability to make street repairs by the company which succeeded to the rights of the railway that accepted the conditions of the ordinance was raised in Collingdale Borough vs. Rapid Transit Co., decided by the Supreme Court on May 8, 1922. The defendant's contention of non liability did not prevail, for the reasons given in that opinion.

The proposition is also renewed, that the plaintiff borough cannot enforce its contract, under the ordinance, against the defendant company, except through the authority and supervision of the Public Service Commission.

We considered this defense in the motion attacking the sufficiency of the plaintiff's statement. We decided the point against the defendant. The able argument of counsel in support of this contention has not convinced us that we

Borough of Jenkintown vs. Transit Co.

were in error. It is claimed that the Collingdale case does not rule this question. We can draw no distinction between that case and the proceeding now before us.

The Court held that a contract under an ordinance requiring a passenger railway company to keep in repair the streets traversed by its tracks, if made before 1913, is not subject to approval by the Public Service Commission. This decision also declared that the provisions of the Public Service Company Law, approved July 26, 1913, P. L. 1374, are not retroactive.

Still more, the Collingdale case decided that an action in assumpsit, in the Common Pleas by the borough, is a proper method to enforce the obligation existing under the contract to repair the streets.

It is argued that Article V, Section 2, of the Public Service Company act, was not pleaded in the Collingdale case. This section gives the Commission jurisdiction over "practices, facilities and services" of a street railway.

We do not see how this section of the Public Service Company act can help the defendant's contention. The Collingdale case determines that a contract, like the one before us, does not fall within the jurisdiction of the Commission, because the contract antedates the passage of the said Act of July 26, 1913.

The Commission cannot disturb the covenant in its binding force upon the railway company, because the Act has no retroactive force, as declared in the Collingdale case.

If the Commission can break down the existing contract under "the facilities and service clause," then it follows that it may do indirectly what it can not do directly.

But the Collingdale case does declare in no uncertain terms that the Common Pleas is the tribunal to enforce the contract. The Court said: "The only matter raised or plainly suggested in the statement of questions involved, is the right of the Court to hear and determine the present action of assumpsit, based upon contracts made before the Act of 1913 became effective. As already indicated, we are of the opinion that jurisdiction of the proceeding was properly entertained."

The Collingdale case is not the only authority upon this

Borough of Jenkintown vs. Transit Co.

question. Sayre Boro. vs. Waverly-Sayre Traction Company, 270 Pa., 420, is to the same effect.

We do not see how Fogelsville Electric Co. vs. Pennsylvania Co., 271 Pa., 237, gives any support to their contention. The Fogelsville Company was organized after 1913. It obtained a certificate of public convenience from the Commission in August, 1917, to enter the township of Macungie to furnish electric light.

The Pennsylvania Company was chartered on June 6, 1913, by the consolidation of numerous companies. One of the constituent companies acquired the right, as early as 1911, to enter the township of Macungie, but nothing was done to occupy the territory before the Fogelsville Company had obtained the certificate of public convenience. The latter company then filed a bill in equity to restrain any interference by the Pennsylvania Company. An injunction was awarded. On appeal the Court held that the Fogelsville Company should have entered its complaint to the Public Service Commission. Any other ruling would have denied the right and power of the Commission to defend its decrees and orders. The Court well said "the orders of the Commission would be nugatory if such interference were permitted." The question was, in fact, an inquiry which of two companies should enter the unoccupied territory. This was a matter to be determined by the Commission. If it had the authority to grant the certificate of public convenience, it must have the right to pass upon matters that stand in the way of the exercise of such authority. At least such power must be vested in the Commission in the first instance.

The affidavit of defense also declares that the defendant company purchased its right to occupy Old York Road from the turnpike company that owned the road bed of the street, that the grant of the borough was unnecessary and that therefore the defendant company received no consideration for the covenant to keep the street in repair.

We cannot assent to the proposition that a street passenger railway can occupy a highway in a borough, without municipal consent, even if a turnpike company owns and operates its road over such street and gives it consent to the

Borough of Jenkintown vs. Transit Co.

railway company to use the road bed for its trolley tracks.

Article XVII, Section 9, of the State Constitution provides, "No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of the local authorities."

A street railway is constructed through a borough whether it occupies a turnpike road or other highway, within the limits of the town, as the railway passes through the municipality. This positive constitutional provision leaves no room for the exception the defendant sets up.

The Courts have held that the grant of a turnpike company does not dispense with the requirement, that the railway company must obtain the consent of the borough through which it proposes to construct its road; *Steelton Boro. vs. East Harrisburg Railway Co.*, 1 Dist. Rept., 667; *Johnstown Turnpike Co. vs. Johnstown Passenger Railway*, 4 Dist. Rept., 594.

"The constitutional provision is intended as a safeguard to the rights of a municipality against the encroachments by organized railways. It would be intolerable if the streets could be invaded without giving the people of the city the right to say anything about it"; *Erie vs. Erie Traction Co.*, 222 Pa., 43.

It is argued that the defendant paid to the turnpike company a large sum of money for the use of the highway and that, therefore, the municipal consent conferred no benefit commensurate with the obligation imposed upon it by the contract.

But the consent of the borough is required, as a condition precedent for the entry of the railway upon any streets in th borough; *Philadelphia vs. River Front R. R.*, 173 Pa., 334.

The municipal consent is a prerequisite to the construction of the railway. If such consent is given upon condition, the railway company must take it subject to the condition, or not at all; *Plymouth Township vs. Railway*, 168 Pa., 181; *Allegheny City vs. Millville Railway Co.*, 159 Pa., 411. The defendant could accept or refuse to accept because of the burdensome condition.

It is argued that there is no privity of contract between

Borough of Jenkintown vs. Transit Co.

the plaintiff borough and the defendant company. This question was considered in our opinion of May 22, 1922. The contract with the Philadelphia, Cheltenham and Jenkintown Railway specifically declared that the condition to repair should bind the successors and assigns of the said company.

It is true it was the duty of the turnpike company to keep the road bed in proper repair, but there was nothing to prevent the borough from exacting the help of the railway company to enforce the turnpike's obligations to make the repairs. If the primary duty to repair devolved upon the turnpike company, then the railway must look to it for reimbursement for any moneys the railway is compelled to pay out for such repairs, whether made by the borough or by the defendant company itself.

It necessarily follows that the defendant's use of the highway with its tracks, sills, rails and cars, tends to put in disrepair the roadbed, especially so because its use of the highway confines the public travel by vehicles to a constricted space.

But it is useless to discuss the difficulties that may confront the defendant company in complying with its contract. It is bound by its covenants.

"Defendant could not enter the borough without its consent" (Article XVII, Sect. 9, of the State Constitution), and the franchise ordinance as accepted, forms a contract between the parties with which defendant must comply; Sayre Boro. vs. Waverly-Sayre R. R., 270 Pa., 414.

"He who can consent or refuse without reason does not make his consent or refusal either better or worse by a good or a bad reason;" Allegheny City vs. Railway, 159 Pa., 415.

The defendant also alleges in its affidavit of defense that it is "uninformed" whether the repairs made were necessary or what, if anything was expended in making them.

The statement sets forth that due notice was given to the defendant company to make the repairs. If it was in duty bound to make them, as we find, then, likewise, it was its duty to see whether repairs were necessary, and to what extent. A view of the existing conditions after notice and be-

Borough of Jenkintown vs. Transit Co.

fore the borough made the repairs, would have given the defendant the information it now seeks.

It operated its electric railway, from day to day, over the street, and had at least the same opportunities as the borough representatives to note the condition of the highway.

The plaintiff alleges in the statement that it made only such repairs as were necessary and charged therefor reasonable prices. A bill of particulars is attached to the statement. It shows the number of men employed, the days and hours they served, and the compensation per hour. It also shows the tons and barrels of materials used and the prices charged per ton or barrel.

There is no denial in the affidavit that the repairs were not necessary or that the charges made are excessive, or that the labor and materials were unnecessary.

The affidavit of defense is not sufficient to prevent judgment. A denial in an affidavit is of no effect, if based solely upon the alleged ignorance of the defendant, without making inquiry as to the facts averred; *Franklin Sugar Refining Co. vs. Hanscom Bros.*, 273 Pa., 98; *Buchler vs United States Fashion Plate Co.*, 269 Pa., 428. In our case it does not even appear that a denial of the averments in the statement is made.

And now July 1, 1922, the rule for judgment is made absolute, and judgment is now entered in favor of the plaintiff, the Borough of Jenkintown, and against the defendant, Philadelphia Rapid Transit Company, for the sum of 582.33, with interest from July 7, 1921.

In the Court of Common Pleas of Montgomery County.

**The Burgess and Town Council of the Borough of Norristown
vs. The Norristown Passenger Railway Company and the
Reading Transit and Light Company.**

Plaintiff filed its bill against defendant corporation alleging failure on the part of defendants to perform certain parts of the contract as was shown by ordinance passed by the plaintiff. A decree was entered against the defendant, exceptions were taken to the finding of the Court, which exceptions are dismissed, because the consent of the borough must be obtained before a street railway can occupy its streets, and no matter how heavy the burden may be, still the railway company cannot be relieved from such requirements unless the legislature remove the same in the exercise of its police power, and where there is a duty imposed upon the railway company occupying the streets, which duty was imposed prior to the establishment of the public service commission, said duty is enforceable in equity, and to permit the defendant to remove such parts of the contract as it saw fit would be in effect making a contract between the parties such as was never intended.

No. 7, April Term, 1921.

Equity.

Sur exceptions by defendants to findings of fact, conclusions of law and decree.

H. M. Brownback, Attorney for Plaintiff.

Larzelere, Wright & Larzelere; Ralph B. Evans, Attorneys for Defendants.

Opinion by Miller, J., June 6th, 1922.

Counsel, other than those who filed the exceptions, appeared at the argument and, relying on those of April 10, 1922, without more, urged that, under all the circumstances, the Court had fallen into error in directing its conclusions of law against both defendants and making its decree run against Norristown Passenger Railway Company as well as Reading Transit and Light Company,—in other words, that on the facts, a decree of specific performance should not be entered against the former company. The point is not well taken.

It is not only the corporation which originally and so long ago as 1884, obtained the franchise to operate a street passenger railway system upon many of the streets of the complainant, but it was the particular company which, by the supplemental ordinance of June 17th, 1902, was granted the right to extend its system on DeKalb street from Brown street to the borough line and, on June 30, 1902, formally accepted the ordinance, with its terms and conditions. Furthermore, it, as one of the parties defendant, filed a separate answer, on which

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

issue was joined, afterwards agreed to an amendment of the bill, and, as to the exceptions, now finds itself in the untenable position either of not having filed any such, or, if it claims that those of April 10, 1922, were also on its behalf, which purports to be the case on their face, then that they were filed too late to be of any avail to it, because it was not a party to the agreement for an extension of time for such filing. It was also represented by counsel at the final hearing.

Under the facts as found and the circumstances just narrated, it is felt that it is not only too late for the Norristown Passenger Railway Company now to take the position it assumes, but when, as here, in consideration of the franchise, it has agreed to make the necessary improvements, the terms of the contract must be complied with until it has, by some recognized legal method, been formally released from the agreed obligation: Borough of Collingsdale vs. Philadelphia Rapid Transit Company, appel., decided by the Supreme Court on May 8, 1922, but not yet reported. Its sufficient remedy should be found under the subsequent contracts of its own making with its subsidiary companies, the lessees and assignee named in the bill, or the findings of fact.

Eleven exceptions have been filed which complain either that we failed to find certain facts, or that those found are erroneous. Whether the subject matter of the first, second and seventh, if true, is a finding of fact or a conclusion of law is of little consequence because, in our 12th and 14th findings, we have found that, prior to 1912, the average annual receipts for use by the Lansdale and Norristown Electric Railway Company of defendants' DeKalb street line were in excess of \$7000 and, since that time and so nearly as can be estimated, receipts, which can be properly credited to business obtained solely by the extension, have averaged but about \$700 per year. Neither the abandonment of operation by the Lansdale Company and its breach of its contract with the Schuylkill Valley Traction Company, nor the consent of the plaintiff that Lehigh Valley Transit Company might use Markley street, as we view it, worked a failure of the consideration upon which the ordinance of 1902 was based. The Norris-

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

town Passenger Railway Company retains the right to enjoy every privilege thereby granted to it.

The subject matter of the third exception is, in our opinion, wholly irrelevant to the case, but, if we are in error in this regard, there is no evidence to be found upon which to base the finding desired.

The fourth exception falls because of the concluding paragraph of our ninth finding. Moreover, there is grave doubt whether the first, second, third and fourth exceptions relate to matters that are germane to the issues raised by the pleadings.

We can see no merit in the fifth and sixth exceptions. The nineteenth and twenty-first findings are sufficiently comprehensive in this connection. Furthermore, the duties specified in the ordinance were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words,—the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions: *Philadelphia vs. Street P. R. Co.*, appel., 169 Pa., 269, 280; *Chambersburg Boro. vs. Chambersburg & G. E. R. Co.*, appel., 258 Pa., 57.

There was no testimony upon which the finding desired by the eighth exception could have been properly predicated and, had there been, it would have been irrelevant. This exception takes entirely too narrow a view of the case. All portions of a street railway system are not usually equally profitable. In each system there is likely to be found both cream and milk. The section of 2200 feet, involved in these proceedings, is but a small part of defendants' system of 71 miles. Our fifth conclusion of law that "a street railway company's financial embarrassment, or the fact that a relatively small portion of its total lines in a municipality may be operated at a loss, constitute no legal excuse for its failure to perform its contract with the municipality for street improvements along the unprofitable portion of its lines" is in harmony with the principle of *Sayre Borough vs. Waverly, S. and A. Tr. Co.*, appel., 270 Pa., 412.

The ninth exception is answered by our twenty-third find-

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

ing which is as definite as the testimony, as we view it, permitted it to be made.

So far as the tenth exception is concerned, we cannot, under the bill and answers and the evidence before us, find as facts that the comp'ainant, against the protests of defendants, destroyed the profitable operation by them of the extension on DeKalb street; that changed conditions of vehicular traffic on the street now require a pavement differing in material and construction from that required by the ordinances, or "that the question of rates for transportation underlies the whole problem;" nor is the desired conclusion that the complainant is bound to maintain this pavement justified by the facts and circumstances of the case.

And, as to the eleventh exception, it is necessary only to say that the second paragraph of our twenty-fourth finding constitutes an exact statement of what transpired. The final hearing was held and concluded on November 1, 1921. The findings and conclusions were not filed until March 30, 1922. The unusual delay in a case of this character caused us great uneasiness. Counsel was repeatedly asked when the application for a surrender of the franchise would be presented. It was not forthcoming and the findings and conclusions were finally handed down.

The failure to present the application could not have been caused by anything said after the argument at the final hearing in an informal discussion of the case which then occurred between the court and counsel. The first intimation thereof is to be found expressed in the exceptions which were not filed until April 19, 1922. Had such been the understanding on November 1st, 1921, we would not have been asked to hold the case and there would have been no cause for the delay in disposing of it. Moreover, it was definitely stated by the trial judge and clearly understood by all that, in no circumstances, was anything said by him to be regarded as indicating the disposition which would be made of an application which was then only in contemplation, but the presentation of which was believed by him to be so near at hand that he agreed that this case should be held so that both could be disposed of at the same time.

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

A careful re-consideration of the whole case discloses, in our opinion, no substantial merit in any of the fourteen exceptions relating to our conclusions of law and decree.

It is earnestly urged, and was ably argued, by counsel for defendants that, viewing the case as a whole, error has been committed in our disposition of it because, first, the relation between the borough and the defendants is not primarily contractual in character, but that such relation really has its origin in the grant by the former to the latter of a franchise or an estate on a condition subsequent; secondly, that, such being the case, the borough is not entitled to a decree of specific performance, but, under the circumstances, the most it can ask for is a forfeiture of the estate for breach of the condition; and, thirdly, that, conceding for the sake of argument, the relation of the parties is purely contractual and that the borough enjoys the abstract right to a decree of specific performance, such a decree should not be entered on the facts before us.

To support their first and second contentions they place strong reliance on cases of which Allegheny City vs. Railways, etc., 159 Pa., 411; Plymouth Township vs. Railway, 168 Pa., 181; and Millcreek Township vs. Erie Street Railway Co., 216 Pa., 132, may be cited as instances, and, unsuccessfully, in our opinion, attempt to distinguish them from Patton Township vs. Railway Co., 226 Pa., 372; Chambersburg vs. Chambersburg & G. E. R. Co., appel., 258 Pa., 57, and Sayre vs. Waverly, Sayre & Athens T. Co., appel., 270 Pa., 412. Extended discussion of these two contentions has been rendered wholly unnecessary by the fact that on the very day on which the exceptions were argued, May 8th, 1922, the Supreme Court handed down its decision in the Collingsdale case, *supra*. In it, both grants provided for the future repair of the highway at the railway's expense. The borough determined repairs were necessary and defendant was requested to make them. The demand was not complied with and the municipality did the work, sued the defendant for its cost and obtained a verdict. On an appeal the judgment was affirmed and the opinion of the Court is that the last authoritative declaration of the theretofore established law, that "consent to the

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

occupation of borough highways by a street railway is required by the constitution and the conditions imposed as a prerequisite of entry become contractual obligations which must be complied with, no matter how onerous, unless stricken down by some proper legislative exercise of the police power.

* * * One of the contractual requirements found in such grants is the obligation by the company to repair or repave the streets occupied. * * * The duty may be enforced specifically, * * * or the required work may be done by the municipality and the cost thereof collected from the railway * * *."

Nor, on the relevant and material facts established by the evidence, is there merit in defendants' third contention. But one-half the cost of original paving was borne by the then operating local company, which required the Lansdale Company to do all the work and pay the balance. Under the advantageous contract with the latter company, no matter what distance it had to carry its passengers for a single fare of five cents, a full fare had to be paid to the local company for every passenger carried by it in either direction south of the borough line. The arrangement was profitable to the local company and continued for nearly ten years. Thereafter the latter alone used DeKalb street. Since 1902, when the extension was built and the new paving put down, it has, under the testimony, expended practically nothing in the upkeep of this pavement, which, by reason of neglect, is now worn out and utterly decayed. The length of the extension is less than 1-142nd of that of its entire system. The company has been repeatedly notified to perform its solemn obligations to the borough and the notices have been ignored. It claims that it operates the extension at a loss and that the demand of the borough is unreasonable, oppressive and confiscatory and, for these reasons, it should not be required to keep its contract.

But what has the borough done of which the defendants can justly complain? There is not the slightest suggestion that it has done anything to estop it from insisting on its clear right to demand performance other than, some ten years ago, to grant a franchise on another street to another company. This defense, even if meritorious, which is not the case, is not

The Boro. of Norristown vs. Norristown Pass. Ry., et al.

set up by the answers. We can see no force in the third contention, especially as the defendants have continued in the use of this street ever since this fancied wrong was done them.

On the authority of the Patton township, Chambersburg, Sayre and Collingsdale cases, already referred to, all the exceptions must be dismissed. The defendant entered into a contract to carry out an undertaking in the borough on certain conditions. It, in effect, asks to be permitted to exercise such part of the franchise granted as is deemed advantageous to itself and seeks to be relieved from a part of its undertaking not considered profitable. This it has no right to do. "No sufficient reason is shown why it should not be required to perform its contracts as are other corporations and individuals. To permit it to elect what part of its obligations it will perform and what part it will refuse to perform, will, in effect, write a contract between the parties which one of them never assented to": *Spring City Borough vs. Elec. Ry. Co.*, 35 Pa. Sup. Ct., 533, 542.

And now, 6th June, 1922, after further mature consideration, it is ordered, adjudged and decreed that all the exceptions filed be dismissed, the decree entered on March 30th, 1922, be confirmed and the prothonotary enter a final decree in accordance therewith.

In the Court of Common Pleas of Montgomery County.

Davis vs. Pinson.

Plaintiff brought an action against defendant for slander. At the trial of the case a compulsory non-suit was granted, whereupon the defendant asked that the non-suit be taken off. The action as brought was based on the theory that the damages claimed by the defendant resulted from a conspiracy between the defendants. There is no evidence in the whole matter showing any conspiracy. The plaintiff knew he had the right of action in the case, but failed to follow out the proper course, and although notified to present himself at the different meetings failed to appear to defend himself and deny the charges made against him.

The plaintiff's motion must, therefore, be denied.

No. 2, November Term, 1920.

Sur Plaintiff's motion to take off compulsory non-suit.

Warren H. Cogswell and John F. McEvoy, Attorneys for Plaintiff.

Irvin P. Knipe, Attorney for Defendant.

Opinion by Miller, J., June 8th, 1922.

The trial was reported, but, because of the voluminous documentary evidence admitted and the consequent unusual size of the record for a case of this character, the stenographic notes have not been transcribed. Our own rather complete trial notes will enable us to dispose of this motion without incurring this considerable and unnecessary expense.

Salem Baptist Church is a corporation organized according to the faith, regulations and discipline of the Baptist denomination. If complaint against one of its members is made to the pastor, he is required to refer it to the Board of Deacons for investigation. If, after hearing, the Board is of the opinion that a prima facie case has been made out, it then presents the matter to the congregation for action. The congregation, acting in assembled meeting, is the supreme governing body of a particular church. When charges are thus preferred against a member, it is the duty of the Board of Deacons to give to the accused a copy thereof with notice of the time and place of hearing.

The plaintiff, who appears to be approaching middle life and never attended school, except for a period not exceeding six months in duration,—in consequence of which he can write only his own name and reads with difficulty,—decided, years ago, to qualify himself for the ministry. He never attended

Davis vs. Pinson.

any institution of learning with that end in view, but made such an individual study of the Bible and Concordance that, as he says, he is now "equipped with all the tools of the trade." His secular occupations have been those of a laborer in a tube mill and a helper in a milk dairy.

Mr. Pinson, one of the defendants, is the regularly ordained pastor of Salem Baptist Church and Mr. Vest, the other, is the chairman of its Board of Deacons.

A licensed preacher in the colored Baptist church is elevated somewhat above the congregation, but not so high as its ordained minister. He has no charge, receives no salary and is not permitted to administer the sacraments or the holy communion. He sometimes assists the pastor, however, and may, on his invitation, even preach. At the church to which he belongs he sits with its pastor during services and, when present elsewhere during such, the courtesy of an invitation to occupy the pulpit with the local minister is usually extended to him. At times he acts as a substitute for the ordained clergy, who are absent on vacations, or otherwise, when he is allowed to receive voluntary donations for his services. When a licensed preacher loses his right to exercise his functions and enjoy his privileges at the church to which he belongs, they cease automatically elsewhere.

Although a resident of Jenkintown, where Salem Church is located, for 18 years or more, the plaintiff, until 1917, was a member of a church of the same denomination at Huntingdon Valley, some miles away, by which he was licensed to preach in 1912. His membership was transferred to Salem Church in 1917. Thereafter and until July 11, 1920, he preached in Salem Church three times only,—once at a Sunday morning service and twice at evening prayer meetings. He occasionally sat with Mr. Pinson in the pulpit. When he visited other churches of the same denomination he sat in the pulpit during services and often preached.

Mr. Pinson left for a vacation in the south sometime immediately prior to July 8th, 1920. He wrote from Asheville, N. C., under that date, "To the Deacon Board of Salem Baptist Church, D. L. Vest, Chairman," a long letter, much of which related to the affairs of the church, the concluding paragraph of which we shall set forth in full. It read: "I

Davis vs. Pinson.

respectfully call your attention to a case which to my mind needs attention. A charge was presented to me just before I left against John M. Davis, to which charge he should answer before he is again permitted in the pulpit of our church. The charge comes from a reliable member who informed me that John M. Davis voluntarily went to Mr. Foy and told him that the fight of the Combs and Gibson girls was a church fight. Now you know full well that if he made such a statement that it was untrue and such a statement to my mind gives the church a bad name, especially to those who never attend our services.

As pastor, and in keeping with our custom, I hereby ask you to call John M. Davis in question and that he not be permitted to the pulpit of Salem Church until he answers to your satisfaction said charge."

The writing of this letter, so far as shown by the testimony, constituted Mr. Pinson's only connection with the matter out of which the suit arose. Mr. Foy was a local Justice of the Peace, and one of the women named had charged the other before him with the crime of assault and battery.

The last regular meeting of the Board of Deacons, which met monthly, had been held on the evening of July 6th.

The pastor's letter of July 8th was delivered to Mr. Vest in due course. Upon its receipt he did not call a special meeting of the board, but went to the church, taking the letter along with him, before the hour appointed for the regular Sunday evening service on July 11th. As Mr. Davis entered Mr. Vest called him into the pastor's study and there, in the presence of two of the seven or eight other deacons, said to him, as Deacon Robinson testified; "I have a letter from our pastor,' and handed it to Mr. Davis to read. The latter replied: 'No, I can't. You read it,' whereupon Mr. Vest read the letter to him." The plaintiff himself testified that Mr. Vest said to him: "You are the man I want to see. The pastor has a charge against you. Here is a letter I received telling me not to allow you to go in the pulpit until you give satisfactory reasons for talking to Foy about the girls and injuring the church."

Deacon Campbell, also present, testified that "little was

Davis vs. Pinson.

said. Vest produced a letter and said it was from the pastor. Vest was then chairman of the deacon board and was authorized to act by the pastor." Mr. Vest's version of the matter was not heard, of course. In consequence of this interview, Mr. Davis peaceably refrained from entering the pulpit on that occasion. It was not shown that he made any denial of the charge, or objection or protest whatever. The whole episode occurred in the privacy of the pastor's study with only the four named, Messrs. Davis, Vest, Robinson and Campbell, present. No one testified that any publicity was given to the matter at the time, that coercion was used, or that an unkind or threatening word was spoken.

It so happened that the evening of the following day, Monday, July 12th, was the regularly appointed time for holding a congregational meeting. Both Mr. Davis and Mr. Vest attended. Rev. Pleasant Z. Moore acted as moderator. Mr. Davis arose and inquired whether any charges had been made against him notwithstanding his own testimony that "the Deacon Board is the proper board to dispose of such matters. It has primary jurisdiction. Then they go to the congregation for action. The mistake was made in taking it to the congregation instead of the Deacon Board. The Deacon Board should act first, then the church." The clerk replied to Mr. Davis' inquiry that "no charges had been received," but the latter wanted "action." He obtained it. The reading of the letter, which Mr. Vest did not have with him, but which he was sent to his home to obtain, was objected to, the objection was sustained, the letter was not read at the meeting, and the whole matter was referred by the congregation to the Board of Deacons. The next regular meeting of the latter was to be held on the evening of the last Tuesday before the second Sunday in August, which fact was known to the plaintiff, but he did not attend it.

Mr. Davis, according to his own testimony, has voluntarily absented himself from all services at Salem Church since July 11th; has never entered its portals since the evening of July 12th, or taken public part in any religious work elsewhere; has never demanded a hearing, or requested the Board of Deacons to act although he says "it has been in my power

Davis vs. Pinson.

to go to the governing body of the church at any time since July, 1920, but it would have been improper for me to do so. I have never asked for a copy of any charges against me." Furthermore, he has never gone to either defendant or had any conversation with them since the occurrence, although the testimony is absolutely bare of any proof that either was actuated in his conduct toward the plaintiff by other than the kindest motives or that their relations were otherwise than cordial.

The foregoing is a rather comprehensive statement of the relevant facts on which the plaintiff relied to establish his claim that he had been excluded by the defendants from the pulpit of his own church, which operated as his exclusion from all pulpits and total disbarment from his profession; that he has suffered this grievous injury through no fault or wrongful act of his own, but solely in consequence of a cunningly and craftily devised plot in which the defendants, acting in concert, conspired and artfully contrived to create a condition which was maliciously calculated and evilly intended, and has resulted in the accomplishment of plaintiff's ruin in his life's work; and that he is entitled to recover the substantial damages mentioned in his declaration. He was non-suited at the trial and now moves that it be taken off.

It is noted in passing that the facts developed at the trial were materially different from those averred in the statement which were the only ones before us on the rule for judgment in an earlier stage of the case.

As to the defendant, Pinson, his only connection with the matter, so far as the testimony discloses, was the writing of the letter of July 8th, 1920. Whether or not the charge was well-founded, or, if true, it involved a breach of duty by the plaintiff, the letter which sets it forth shows on its face that it was written by a pastor, in keeping with custom, to the Board of Deacons of his church. Under the church law this was the proper thing for him to do. It was the investigating body having primary jurisdiction. A licensed preacher in the church had been reliably charged with telling an untruth to its injury. The pastor directs the matter to the board's attention, suggests that Mr. Davis be heard and recommends that "he not be permitted to the pulpit of Salem Church until

Davis vs. Pinson.

he answers to your satisfaction said charge." The testimony is silent as to when he returned from his vacation. The letter was an official document and the testimony disclosed no proof, or insinuation even, that Mr. Pinson, in its writing, or Mr. Vest, in its subsequent use by him, was inspired by any unworthy or improper motive or design.

It was received by Mr. Vest in his official capacity. The first person to whom it was shown was Mr. Davis himself. This was done in the privacy of the minister's study at the church. No threats were uttered, no unkind words spoken by either. Nothing happened that even suggested coercion or ill-will of any kind. The net result of the interview was that it seems to have been the unanimous opinion of all present that the plaintiff should not enter the pulpit at that service. He refrained from doing so. No one testified that he either denied the charge contained in the letter or made any objection to its suggestions. It is noteworthy that at the congregational meeting of the following evening, Mr. Vest did not even have the letter, which at that time did not concern it, along with him and had to return to his home to get it when he was directed to do so.

The plaintiff's action sounds in tort. It was tried on the theory that the damages claimed by him resulted from a conspiracy between the defendants. That conspiracy was the gravamen of his complaint. But there was not even a scintilla of evidence of any such unlawful combination or of any act done in furtherance of the common design. The testimony is barren of any proof of an actionable wrong by either of the defendants, acting either alone or in concert. The plaintiff's case therefore failed fundamentally. It showed nothing more than the orderly preferment of a charge to the proper inquisitorial body of the church, its receipt thereof, and no subsequent official action taken.

If the plaintiff has a grievance it lies, in our opinion, in the fact that the Board of Deacons thereafter took no proper, official action. It should have sent him a copy of the charge with notice of the time and place of hearing. He denies having received any such, but it was referred to the board for action by the congregational meeting in his presence and he

knew of the charge and its nature, and when the board would next regularly meet to consider it. Even were the board in default, he never lifted his hand to speed the matter to a hearing within the church organization before bringing his suit on November 8th, 1920. Mr. Pinson was not a member of the board and Mr. Vest was but one of the eight or nine who constituted it. It is not even charged, let alone proven, that the latter did anything to influence its action. As the defense was not, of course, heard, ordinary fairness requires us to say here that the affidavit of defense avers that, at the congregational meeting of July 12th, the plaintiff was informed that the charge would be heard by the Board of Deacons at its August meeting when he replied: "All right;" and that he failed to appear and the hearing was then continued until the September meeting, and a committee was appointed to see him personally and urge his attendance. "The committee could not find him and in September the Board of Deacons referred the matter to the church meeting, whose secretary sent to the plaintiff by special delivery mail a notice to appear before the October church meeting to answer the aforesaid charge. Plaintiff did not so appear, has never been at or near the church since July 12, 1920, was fully informed of the charges against him and had repeated opportunities to answer them, never denied the truth thereof, and that they remain undisposed of to this day is entirely his own fault."

The character of the parties, the undercurrents in the case, the insinuations and ugly charges contained in the statement, which were wholly unsupported by proof at the trial, and the fact that the record has not been transcribed, combine in requiring this opinion to be longer than otherwise would have been necessary. We have been at some pains to narrate all the relevant facts as they must be viewed in connection with a motion for a non-suit. The plaintiff produced no proof sufficient to carry his action as brought, to the jury, no amendment was asked for, and he was properly non-suited.

And now, eighth June, 1922, the motion to take off the compulsory non-suit is overruled.

In the Court of Common Pleas of Montgomery County.**Kleckner vs. Rash**

Plaintiff started foreclosure proceedings on mortgage against defendant. Defendant interposed the defense in which he claimed that certain articles which should have been left on the premises were taken away by the plaintiff, but the evidence as produced by the plaintiff does not definitely show the number of articles removed or their kind, character or value, but the evidence is positive on the fact that settlement was made on this property at least two weeks after the alleged discovery of removed articles was made, and no objection was made at the settlement. The defendant having defaulted in the payment of interest for the period stated in the mortgage, plaintiff is entitled to judgment for the full amount with interest.

No. 4, June Term, 1921.

Sci. Fa. Sur Mortgage.

Trial without a jury.

Larzelere, Wright & Larzelere, Attorneys for Plaintiff.

E. L. Hallman, Attorney for Defendant.

Opinion by Swartz, P. J., May 25th, 1922.

Suit was brought on a mortgage executed on December 8, 1920, by the defendant to the plaintiff. The mortgage was given for part of the purchase money under a conveyance made by the said Kleckner to the said Rash.

The principal of \$3800 was made payable in one year, with interest at six per centum, payable half yearly.

The mortgage also provided, that the mortgagor should, at all times, maintain an insurance of not less than \$3800 and assign the policy to the mortgagee, as collateral security.

If the interest was not paid for thirty days after any half yearly payment fell due, or if the insurance was not maintained, as aforesaid, then the whole principal debt and interest were to become due, at the option of the mortgagee.

In this action the plaintiff alleges that there was default in the payment of interest and in maintaining an insurance on the property.

The defendant filed an affidavit of defense in which he alleges, that under the agreement of sale for the property, he was entitled to certain awnings and a storm door, and that the plaintiff removed the same, after the title papers had passed and after the mortgage was given. He claims the awnings were worth \$350 and the storm door \$150.

He contends that no interest was due, because the plain-

tiff should have applied the value of these fixtures to the payment of the interest and in taking out insurance.

FINDINGS OF FACTS.

1. The parties plaintiff and defendant exchanged properties at certain agreed prices. The plaintiff was the owner of a property at Bala, Montgomery County, which the defendant agreed to buy at the price of \$35,000. The property was subject to a mortgage of \$20,000. The defendant owned a house No. 5070 Parkside Avenue, Philadelphia, which the plaintiff agreed to buy at the price of \$14,500. This property was subject to an existing mortgage of \$3800. The defendant, to make up the balance of the purchase money, was to make a cash payment of \$500, and give a mortgage on the Bala property for \$3800. This was done and the last named mortgage is the security upon which the present action is brought.

2. Under the written agreement for the exchange of properties, made on the 15th day of September, 1920, it was stipulated that "the gas fixtures, heaters, ranges and all permanent fixtures and awnings of the house in Bala should remain. The gas fixtures, heaters, ranges and all permanent fixtures and shades, in the house at 5070 Parkside Avenue should remain.

3. We find, as a fact, under the testimony submitted, that the defendant and his family took possession and moved into the Bala premises, on November 20, 1920. The settlement at the title office was not made until December 7, 1920, but all interest, taxes and water rents were computed, at said settlement, as if the actual exchange had taken place on said 20th day of November. The settlement sheet so declares.

4. The defendant, his wife and daughter visited the Bala house, before the agreement of purchase was made. They claim that a number of awnings were stored in a room on the third story. The evidence as to number, size and quality is very indefinite. They claim that the plaintiff stated that the awnings were sufficient for the whole house. A day or two after the defendant moved into the house he discovered, as he declares, that there were but two awnings in the third

Kleckner vs. Rash

story, one in bad condition and the other fairly good. Mr. Felix, the attorney for the defendant in the negotiations, says he saw some awnings in the third story. He also testified that at the settlement the plaintiff said there were enough to cover the house. He, too, was unable to give the size or number of the awnings on the third floor.

The defendant and his wife declare that the awnings were folded together and were not taken apart nor counted. The witnesses for the defendant estimate that there may have been four to five or six awnings. The plaintiff and his wife are very positive that there never were more than two awnings in the house, and that they were left on the premises.

5. No complaint was made about the missing awnings at the settlement, although this took place seventeen days after the defendant's family moved into the Bala house. They now declare that they discovered a day or two after they took possession that the awnings had been removed. No claim was made for damages at the settlement, although the defendant was required to allow thirty dollars credit for a range that he removed from the Philadelphia house.

The defendant's wife says she called the attention of the plaintiff to the missing awnings a few days after she was in the house. This the plaintiff positively denies. He says he never had a word of complaint of any kind at any time.

6. We are not convinced that the plaintiff removed any awnings from the Bala house, and we so find as a fact.

7. The defendant has failed to establish, by the weight of the evidence, that any awnings were removed.

8. If there were more than two awnings in the store room at the Bala house, the evidence fails to show how many were removed, or their size, condition or value.

9. What we just said concerning the awnings applies with greater force to the storm doors. The affidavit of defense complains of one storm door. The witnesses now speak of three. We are satisfied that the standing door noticed in the third story was a door removed from a closet by a former owner who substituted a curtain for the door. It was not a storm door, but may have had such appearance to the defendant's witnesses. The evidence is convincing that the

Kleckner vs. Rash

house never had any storm doors and that the overhanging second story made them unnecessary.

10. The proof as to their value, even if any storm doors were taken away, is not shown. We do not know the number, the size, the wood or their condition. The witness who testified to their value gave us a mere guess based upon no established facts.

11. There was no claim for damages at the settlement for the removal of awnings or storm doors, although the evidence shows that the defendant had knowledge of the alleged removal more than two weeks before said settlement.

12. There was no claim for such damages at any time before the foreclosure proceedings were instituted. There was no excuse for the non-payment of the half yearly interest or for the failure to take out insurance as required under the mortgage. If the defendant had in mind any such claim for damages, it is strange that he failed to excuse his default by giving the same reasons then that he now assigns for his failure to pay the overdue interest.

13. We are convinced, under all the evidence, and the facts and circumstances surrounding the case, that the defense now submitted is an afterthought.

14. We find that there was a default in the payment of the interest due on the mortgage for more than thirty days, and that the defendant failed to comply with the terms of the mortgage relating to the insurance of the property.

There is no valid set-off against the plaintiff's claim for debt interest and costs.

DISCUSSION.

In our findings of facts we referred to the testimony and it is perhaps unnecessary to add anything in their support.

That the defendant and his family moved into the Bala house, on Novmeber 20, 1920, is the admission of the defendant himself. To say that the entrance was made on the day after the settlement is contradicted by the settlement sheet made by the trust officer and by his testimony.

The plaintiff's wife refers to her son's birthday, on No-

Kleckner vs. Rash

vember 21, 1920. She says that matters were so disarranged by her removal on the 20th that she had to forego the usual birthday party. She also says that the defendant's goods were on the lawn, on November 20th, before her own furniture was fully removed from the Bala house.

The defendant paid taxes, interest and water rent computed from the said 20th day of November. Why should he pay these charges from that date if he had no use of the house before December 8th, 1920, the day after the settlement?

The burden was on the defendant to show, by the weight of the testimony, that the awnings and storm doors, included in the purchase, were in fact removed by the plaintiff.

He declares in his affidavit of defense that they were removed "after the title papers had passed, deed made and mortgage given." The deed and mortgage were executed on December 7, 1920. It follows that the alleged removal must have taken place while the defendant was in possession of the house.

There was no more than a cursory observance of the awnings and the door, when the members of the defendant's family visited the Bala house before the agreement of sale was made. The awnings were folded and standing together. They were not opened or counted. The witnesses could not tell the number, condition or size.

Why should the plaintiff remove old awnings that were adapted and constructed for particular windows? Why should he remove a storm door that may be useless for any other house? Some effort should have been made to trace these fixtures, if the defendant was convinced that the plaintiff carried them away.

It may well be that the plaintiff praised his property beyond its true value or importance. This is not unusual, but the affidavit makes no charge of any misrepresentations, fraud or deceit. Defendant can not shift the basis of his claim. Misrepresentations that induced the purchase must not be substituted for a claim that the plaintiff took away the goods which he had sold to the defendant. There is no contention, even at this time, for any deduction because

of misrepresentation. The defendant still alleges that all the property he bought was in the store room, just as represented to him. He claims the value of the articles removed, and not damages for any misrepresentation.

We were favorably impressed by the testimony of the plaintiff and his wife. We do not believe that they carried away any awnings or doors. On the other hand the evidence of the defendant, his wife and daughter is uncertain, and not in accord with their acts and conduct. At first all the awnings were carried away, later it was admitted that two remained. A mortgage debt can not be defeated by evidence so uncertain and unreliable.

CONCLUSIONS OF LAW.

1. Under the law and the evidence the defendant failed to establish any defense to the plaintiff's claim on his mortgage. No property included in the purchase of the Bala property was removed by the plaintiff. The defendant failed to make out an equitable defense to the suit on the mortgage.

2. The plaintiff is entitled to judgment for \$3800 with interest from December 8th, 1920, at six per centum, to which an attorney's commission of five per centum must be added.

3. The costs are to be paid by the defendant.

And now May 25th, 1922, it is ordered, adjudged and decreed, that the foregoing conclusions of law and findings of facts be filed in the Prothonotary's office, who will give notice forthwith to the parties or their attorneys of the said filing. If no exceptions are filed in the proper office within thirty days after the service of such notice, the Prothonotary will enter judgment according to the decision this day filed.

In the Court of Common Pleas of Montgomery County**Story and Clark Piano Co. vs. Baker**

Plaintiff leased to A and B a certain piano, A being the father of B. When the representative of plaintiff called upon B he stated that the piano would not be leased until another name was on the paper, because B owns no real estate, whereupon B sought A to go on the lease. A refused, whereupon the agent represented to A, that he simply wanted A to sign as a witness. Judgment was entered on the lease, whereupon A sought to have the judgment opened as against him. Under the facts as shown by the evidence A is entitled to have the judgment opened and be let into a defense, and have the issue tried before a jury.

No. 505, November Term, 1921.

Rule to show cause why judgment should not be opened.

John B. Evans, Attorney for Petitioner.

Byron, Longbottom & Pape and E. L. Hallman, Attorneys for Plaintiff.

Opinion by Miller, J., April 10, 1922.

The defendant, Kryder E. Baker, who contemplated marriage, desired to acquire a piano from the plaintiff, but did not have the money with which to buy it. A lease for the instrument was therefore prepared and Mr. Baker was named as the lessee in the body of the instrument. It was in the form customarily used in such cases, provided for the payment of the rental, \$50 down and \$15 monthly until the total of \$625 was paid, when the lessee could acquire title to the piano for the additional sum of \$1, and it contained a covenant for the confession of judgment in case of default.

The agent learned, after the lease had been prepared, and before the piano was delivered, that Mr. Baker was unmarried, did not own real estate and his given residence, 72 Charlotte street, Pottstown, Pa., was the home of his parents, with whom he was then living. Mr. Hayes, the agent, thereupon declined to let him have the piano without another name on the lease.

Kryder E. Baker then went to his home and discussed the matter with his father, who flatly declined to assume any liability in the transaction. His son informed him that his name on the lease was required only because the instrument, when delivered, was to be brought to his home and he was assured there could be no harm done by his going to see Mr. Hayes anyhow and discussing the matter with him. He

went and his wife, his son, and the young lady whom the last afterwards married, went along .

The depositions establish, by the great weight of the evidence, that the agent, who had been informed that the father would refuse to become a party to the transaction, assured him at this interview that, it was desired, because of the circumstances, he attach his signature to the lease only as a witness to its execution by his son, and by doing so, he would assume no liability under it. He, thereupon, did so, at the place indicated by the agent, without reading it, because of defective sight, or having it read to him.

His name appears on the original lease under that of his son at its lower right hand corner and both signatures have under them the printed word "lessee." The name of Mr. Hayes appears on the lease to the left as a subscribing witness.

The piano was then sent to the house of William L. Baker, where it remains. The only rental that Kryder E. Baker ever paid was the initial sum of \$50, which was made up of \$15 allowed to him for a used phonograph, which he gave in part payment, \$15 more (when paid is not shown), and \$20 paid on November 10, 1921. Judgment was entered on February 3, 1922, and the damages were assessed at \$632.50. The petition of William L. Baker to open it was filed on February 23rd and no answer was made thereto. We have no hesitation in concluding, under the depositions, that he has shown by the measure or standard of proof required in such cases that we are not only justified in submitting to a jury the question of fact involved, but that he is entitled to have a jury pass upon the question of his liability.

The admonitions "Read this contract before signing," and "Story and Clark Piano Company are not responsible for any agreement or promise other than written or printed on the face of this lease," so conspicuous on the contract, relate to the substance of the lease and not to the fact of its execution. William L. Baker takes no exception to the agreement itself and disputes none of its terms. His sole defense is that he was not a party to it. Three witnesses, counting his wife as one, corroborate him and he is contradicted by but one—the agent.

Piano Co. vs. Baker

It is not contended by the plaintiff that he was interested in the piano, or took any part in the preliminary negotiations for its purchase, yet, on its face, the executed lease makes him a joint tenant of it. Taken at its face value, the deposition of the agent indicates, however, that, at most, he became only surety of his son.

The conclusion just reached renders it unnecessary to discuss the second ground on which petitioner relies. Whether or not his name was inserted in the body of the lease after he had attached his signature to it, thereby possibly working a material alteration in the document after its execution, is, under the depositions, a more closely disputed question. It clearly appears, however, and in fact it is admitted, that his name was thus written in after the lease had been prepared. The agent says that it was done before William L. Baker signed. Other witnesses say just as positively that it was not there when he attached his signature. The words "lessee," as it so frequently appears in the printed form, was nowhere pluralized, however, and a most superficial inspection of the lease discloses that several material blank spaces in it have been filled up in an ink differing from that used when it was first prepared.

And now, tenth April, 1922, rule absolute, the judgment, so far as it is against William L. Baker, is opened and he is allowed to defend against it. Counsel will prepare the issues and submit them to the court for approval before they are filed. All proceedings on the judgment against William L. Baker are stayed meanwhile, but its lien will, of course, remain.

In the Court of Common Pleas of Montgomery County.**Needs vs. Gottshalk.**

Plaintiff filed his bill against the defendant who was a personal representative of G. whom the plaintiff claimed was in partnership with, for an accounting of partnership assets. The evidence, however, shows that G purchased construction machinery under execution made by the sheriff, and further the plaintiff when he went into bankruptcy disclaimed having any other assets than those set forth in his schedule, which did not set forth interest in partnership as an asset. The checks of decedent G show that the plaintiff was paid a regular salary and had no interest in the proceeds of the contract. Counsel for the respective parties then proceeded under the bill to determine, what, if anything, was due by the decedent's estate to the plaintiff.

Under the facts as produced, plaintiff was more than over paid by defendant, and therefore, judgment must be entered in favor of defendant.

No. 5, September Term, 1921.

Equity, Hearing on Bill, Answer, Replication and Proofs.

Wallace M. Keely and Henry Freedley, Attorneys for Plaintiff.

Irvin P. Knipe, Attorney for Defendant.

The bill alleges that the plaintiff and Joseph W. H. Gottshalk were partners in the business of contracting for the building of bridges and other structures, and asks for an accounting of the partnership assets by the executor of the said Joseph W. H. Gottshalk, deceased.

The executor answers that there was no such partnership; that there are no assets in the hands of the executor in which the plaintiff has any interest whatever, and that there is no money due the plaintiff.

FINDINGS OF FACTS.

1. Joseph W. H. Gottshalk issued execution against the Needs-Brooks Construction Company. At the Sheriff's sale, under the execution, Mr. Gottshalk purchased certain materials, tools and machinery which had been used by the Needs-Brooks Company for construction purposes. This sale was held on October 10, 1917.

2. Shortly afterwards Mr. Gottshalk entered into the business of constructing bridges and other erections. He obtained contracts to construct county bridges. All his contracts were taken in his name. Mr. Needs, the plaintiff, worked on these bridges and constructions.

3. One of the earliest contracts with the county related to the reconstruction of a bridge at Green Lane. The alleged partnership, under the allegations in the bill, covered the

Needs vs. Gottshalk.

period during which this bridge was repaired or reconstructed.

4. Mr. Needs went into bankruptcy and when examined by the referee as to his assets, on April 29, 1918, he declared under oath that he had no interest in the contracts held by Mr. Gottshalk; that he had no share in the profits made, and that he worked for Mr. Gottshalk at a salary.

The schedule of Mr. Needs' assets makes no reference to any interest in Mr. Gottshalk's contracts, or to any partnership in which he had an interest.

The Green Lane contract was awarded on September 10, 1917, and Mr. Gottshalk was paid \$11,748.33. The next contract was awarded on October 24, 1917, and Mr. Gottshalk was paid \$1,368.57.

The time books show that Mr. Needs received wages for his work, at the Green Lane Bridge, at the rate of \$5 per day.

5. There is no evidence of any payment to Mr. Needs for a share in the profits of any contract taken in the name of Mr. Gottshalk. The bank books "C" referred to in the plaintiff's bill as the account of the partnership deposits, give no evidence that Mr. Needs was interested in these deposits. Mr. Gottshalk kept his bridge receipts and disbursements in this account "C." Apparently he did not wish to mingle this business with his other transactions.

6. Bill heads were printed and used with the words "J. W. H. Gottshalk, General Contractor" and in the left hand tops of these bill heads the name of Mr. Needs appeared as follows: "Aug. G. Needs, Manager." On one of these letter sheets a contract is found signed by Mr. Needs. The letter heads were used as early as September 19, 1919.

7. C. M. Carl had a contract with Mr. Gottshalk for the construction of a dam. Difficulties arose and suit was brought by Mr. Carl against Mr. Gottshalk. At the trial Mr. Needs appeared as a witness. He contended that he was the manager or agent of Mr. Gottshalk in obtaining the contract and building the dam. He disclaimed having any other interest in the transaction. This contract was made October 30, 1919, during the period Mr. Needs alleges in his bill that he was a part-

Needs vs. Gottshalk.

ner with Mr. Gottshalk in the building of bridges and other structures.

8. The evidence shows that Mr. Gottshalk made expressions on different occasions, indicating that partnership relations existed between himself and the plaintiff. There is no evidence when the alleged partnership began or ended. There is nothing before us to show the terms of the co-partnership, nor is there any proof that the plaintiff ever drew a dollar out of the proceeds of the business, or that he supplied one dollar toward the work.

The burden was upon the planitiff to establish the existence of a partnership. He has failed to meet this burden.

9. Mr. Needs was an expert mechanic. He had experience as a bridge contractor. He was competent to interpret drafts, drawings and specifications. Mr. Gottshalk lacked this knowledge and experience. He could not make estimates or bids without the assistance of Mr. Needs, who would explain the drawings. He was a valuable man to Mr. Gottshalk in the business he was conducting. Mr. Needs was a competent builder and foreman. Mr. Gottshalk obtained many contracts from the County of Montgomery for the construction, repair and rebuilding of bridges, from October, 1917, to April, 1920.

10. The timebook and a number of checks for multiples of five dollars indicate that Mr. Needs received but five dollars a day for his valuable services to Mr. Gottshalk. It may well be that additional compnesation was given or promised from time to time.

11. We have no proofs of any such promises, except the repeated declarations of Mr. Gottshalk that the plaintiff owned a half interest in the machinery used by Mr. Gottshalk in building bridges and other structures.

12. The plaintiff claimed a one-half interest in this machinery. When Mr. Gottshalk was about to retire from business, because of physical weakness from a lingering illness, the plaintiff became anxious for the protection of his interests in this machinrey.

13. About 1919 the plaintiff and Mr. Gottshalk had a conference in the office of Mr. Hallman, a member of this Bar. The plaintiff claimed that he owned a half interest in the tools

Needs vs. Gottshalk.

and machinery and that he had nothing to show for it, as everything stood in the name of Mr. Gottshalk. He wanted to know if he would be protected if anything happened to Mr. Gottshalk. Counsel suggested that there should be a writing prepared showing the plaintiff's interest in this machinery. To this Mr. Gottshalk did not dissent, but gave an apparent guttural approval. At least the attorney so understood him. He prepared the paper, mailed it to the parties, but has no knowledge whether it was signed.

14. Mr. Gottshalk retired from the contracting business in August, 1920. He had in his possession the tools, machinery and also some supplies used in bridge construction. In the spring of 1921 he desired to sell the tools, machinery and supplies in his custody. Some lumber also remained on his premises.

15. Mr. Cressman, the president of the Valley National Bank, called on Mr. Gottshalk with the view of buying the tools, machinery and supplies, including the lumber. Mr. Gottshalk offered to sell his half interest for \$1500.

16. Later Mr. Isaac H. Barndt called and Mr. Gottshalk agreed to sell his half interest in the tools, machinery, supplies and lumber for \$1600. The witness purchased the said one-half interest at the figure named. He is very clear that the contract covered only one-half the articles. He paid \$100 cash, and gave his note for \$1500. Mr. Gottshalk made certain promises that Mr. Barndt claimed were not fulfilled. He would not pay the note. Finally Mr. Gottshalk declared if he paid the note at once he would give Mr. Barndt full title to all the articles and not simply a one-half interest. Mr. Barndt, for his protection, called on Mr. Needs, who claimed to own the other half, according to the original contract with Mr. Gottshalk. Mr. Needs agreed that Mr. Barndt should buy the entire outfit at the price named.

17. There are other witness who heard these declarations of Mr. Gottshalk when he sold the machinery, tools and supplies to Mr. Barndt. We are convinced from the evidence that Mr. Needs did own a one-half interest in the machinery and tools. We cannot find, however, that such ownership included the supplies on hand. All that Mr. Needs claimed when the

Needs vs. Gottshalk.

matter was discussed in the office of counsel, was a half-interest in the machinery and tools. We cannot allow him more than he claimed.

18. How this ownership vested in the plaintiff does not clearly appear. Mr. Gottshalk had promised him a bonus in addition to his salary, and it is quite evident that Mr. Gottshalk did not fully compensate Mr. Needs, under his daily pay, for the valuable services he rendered. Some of the tools and machinery still on hand were purchased at the sheriff's sale aforesaid. It may well be that Mr. Needs was satisfied to continue his labors under the assurance that he was to be a half owner in the machinery and tools.

It is not necessary to determine how the title vested in Mr. Needs. It is sufficient to know that it did so vest, and that Mr. Gottshalk fully recognized this claim made by the plaintiff.

19. In July, 1921, after Mr. Barndt had consulted Mr. Needs, he paid the note of \$1500 and received the machinery, tools, supplies and lumber.

The negotiations leading to the sale began in April, 1921. About this time, in the month of May, 1921, Mr. Gottshalk presented an itemized bill of his account against Mr. Needs. It showed an indebtedness of more than \$1800. Mr. Needs said he would pay it. He complained that Mr. Gottshalk should have taken more contracts so that the claim could have been evened up. Two witnesses were present when these statements were made by the plaintiff. They also say that the plaintiff at this time wanted to borrow \$200 and that Mr. Gottshalk replied, "No, Gus, you owe me too much already."

20. Nothing was said by Mr. Needs that he had a counter claim for one-half the machinery and tools.

21. Although Mr. Needs knew of the sale and payment of the \$1500 by Mr. Barndt, he made no claim then or at any other time, so far as the evidence discloses, for a share in the proceeds of sale.

22. Mr. Needs, according to the bill presented to him, was in constant need of funds. He borrowed from Mr. Gottshalk from time to time and bills of all kinds contracted by Mr. Needs were paid with money furnished by Mr. Gottshalk.

Needs vs. Gottshalk.

He saw the bill referred to. He was called to the stand. He did not dispute the items. All that he said was that the account had been settled.

23. He was working away from his home. He paid rent. His silence as to any large claim he had against Gottshalk is inconsistent with his present contention. Why should he ask for a loan if Mr. Gottshalk owned him this substantial sum of money?

24. We conclude that he made no claim because he well knew that upon an accounting the balance would be greatly in favor of Mr. Gottshalk. Mr. Gottshalk lived for about one year after he retired from business. There was ample time to settle this claim in his lifetime.

It is most unusual to find that a man apparently so impecunious, would allow a good claim to stand for a long time without any effort to collect it; especially so when his debtor is in declining health and may be carried away by the disease that has attacked him.

DISCUSSION.

Our findings of fact are supported by the evidence to which we referred. A review of the testimony shows a case barren of any of the essential facts to establish a partnership.

The plaintiff's sworn testimony before the referee in bankruptcy distinctly denies the existence of any partnership.

There is no proof of any sharing in the profits of the business conducted by Mr. Gottshalk. If there was such partnership for a period of about three years it would be impossible to conceal the fact. Some dealing or money transaction would come to the surface to establish the existence of a partnership.

From the argument of counsel for the plaintiff we do not understand that they persist in any claim other than the one-half interest in the sale made to Mr. Barndt.

This claim we allow because of the admissions made by Mr. Gottshalk and the corroborating circumstances. If his admissions bind him, then in like manner the admissions of Mr. Needs should bind him.

These admissions must be taken in connection with his actions and conduct. They show that he well knew he could

Needs vs. Gottshalk.

not, in the lifetime of Mr. Gottshalk, establish any valid claim against him.

When the question of a partnership accounting apparently dropped out of the case, counsel for defendant declared, at Bar, that he was entirely satisfied to have the Court pass upon any issue raised by the evidence even if it did not fall within the jurisdiction of the Court in equity.

As both parties agreed to try the case in the Equity side of the Court, we shall not interfere; *Penna. R. R. vs. Bogert*, 209 Pa., 589.

One of the difficulties that confronts us in allowing the claim of Mr. Needs for a one-half interest in the machinery and tools, is the failure on his part to mention the same when Mr. Gottshalk confronted the plaintiff with the itemized bill of charges amounting to \$1800.

The answer may be found in the fact that at the interview mentioned Mr. Gottshalk had not received the money from Mr. Barndt. Mr. Needs could not well claim a share of the money not yet in hand. Mr. Gottshalk still held the articles. We think, however, that the true answer is found in the fact that Mr. Needs well knew it was useless to enter upon an accounting because of his actual indebtedness to Mr. Gottshalk, in excess of said half interest.

CONCLUSIONS OF LAW.

1. The evidence fails to show that there was any existing partnership at any time between the plaintiff and the said Joseph W. H. Gottshalk.

2. The plaintiff owned a one-half interest in the machinery and tools used by the said Joseph W. H. Gottshalk in building bridges and other structures. The value of this interest was not one-half of \$1600, but one-half of what was left of the \$1600 after the sale value of the supplies and lumber was deducted. This interest was less than \$800.

3. The plaintiff was indebted to Joseph W. H. Gottshalk in a sum in excess of this half interest aforesaid. There is nothing due the plaintiff upon a statement showing the mutual claims against each other.

4. The bill should be dismissed and each party should pay

Mowrer et al. vs. Bauer et al.

his own expenses and one-half of the record costs. No counsel fee should be taxed in the case.

And now February 6, 1922, the foregoing findings of fact and conclusions of law are filed in the office of the Prothonotary who will give notice forthwith of such filing to the parties or their respective counsel and enter a decree nisi that the bill be dismissed, the costs to be paid as set forth in our fourth conclusion of law. If no exceptions are filed as provided by the Equity Rules the prothonotary will enter a final decree accordingly as of course.

In the Court of Common Pleas of Montgomery County.

John A. Mowrer and Joseph C. Mowrer vs. Edward K. Bauer and Bertha H. Bauer.

Frank S. Patten vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

Irving J. Creed vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

John W. McKeeman and Edmund McKeeman vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

Plaintiffs as contractors and sub-contractors filed a lien against property of defendants. Sci Fas were issued about two months later to which defendants filed its affidavit of defense, and about six months later ask leave to file supplemental affidavits in which they attack the sufficiency of notice of filing the lien, and as to the three sub-contractors an additional reason was set up that the notice of intention to file was defective and insufficient in that it failed to set forth the nature of the labor and materials furnished. After a Sci Fa has been issued, and an affidavit of defense filed thereto it is then too late to strike off the lien. The notice was served on one of the defendants personally and upon the other by leaving it at his residence with an adult member of his family. Under the law as amended this would have been a proper service, notwithstanding whether service was made by a person other than the sheriff.

The sub-contractors' notices simply stated "all painting and glazing work done on the said house," "slate and metal work on the roof of your home," all plastering work on the above house," and in each of these cases only the balance due was specified.

The defendant claims that this was not sufficient information and that the notice to set forth specific work to be done, but under the decisions only the nature of the work need to be set forth, but in the lien itself it is necessary that the information be more specific. The rule must be discharged.

Mechanic's Lien, Motion to Strike Off.

Nos. 4, 5, 6, 7. June Term, 1921.

F. A. Sobernheimer, L. W. Melcher, Attorneys for Plaintiffs.

F. K. Swartley, Larzelere, Wright & Larzelere, Attorneys for Defendants.

Opinion by Miller, J., July 14, 1922.

Vol. XXXVIII No. 41.

Mowrer et al. vs. Bauer et al.

The premises described in the claims are owned by Edward K. Bauer and Bertha H. Bauer, his wife, as tenants thereof by the entirety, and all four arise out of the erection and construction thereon of a new dwelling house for which Mowrer Brothers were the general contractors. Mr. Patten, Mr. Creed and John W. and E. McKeeman were sub-contractors who furnished material for, or performed work and labor on, the house.

The claims were filed on June 16, 1921, and sci. fas. were issued on all on August 4th following. Affidavits of defense to the merits were filed on September 23d. Subsequently, or on April 27, 1922, the defendant owners asked leave to file supplemental affidavits in all four of the cases, raising the additional technical defense that notice of filing claims had not been served as required by law and rules were granted on the respective claimants to show cause why the same should not be filed. These rules have been argued and will be disposed of in a separate opinion handed down herewith. Pending their disposition, each claimant moved for judgment for want of a sufficient affidavit of defense. These motions also have been argued and will be considered at the same time and in like manner.

After the sci. fas. had been issued, defense to the merits had been set up and effort had been made also to defend technically, as set forth above, the defendant owners, on May 4, 1922, obtained the rules to show cause why the claims should not be stricken off which are now before us for consideration, setting forth in each of their four petitions, as reasons therefor, "that your petitioners * * * are owners as tenants by the entirety, of the premises described in the said claim" and "that the notice of the filing of the mechanics' claim in the above action was not served personally upon Edward K. Bauer, one of your petitioners, as required by Section 21 of the act of June 4, 1901, P. L. 431, as will appear from the affidavit of service of said notice filed of record in this action * * *." To all of which the respective claimants answered admitting ownership by the petitioners, as averred in their petitions, declaring that notices of filing claims had been served as required by law, and claiming that, by reason of what had already transpired in the suits brought for collection of their

Mowrer et al. vs. Bauer et al.

claims, as narrated above, the petitioners were not entitled to the relief for which they prayed.

This reason, upon which all the rules were based, it is at once apparent, does not go to the form, contents, or time of service of the notices of filing, but is directed solely to the manner or method of such service, which, as appears by the affidavit thereof, was made in each case upon Bertha H. Bauer, personally, and upon Edward K. Bauer by leaving the notice at his residence with an adult member of his family.

The petitions for the rules to strike off the three sub-contractors' claims set up an additional reason therefor, that "the 'notice of intention to file the said mechanic's claim was defective and insufficient in that it failed to set forth 'the nature of the labor and materials furnished,' as required by the act of March 24, 1909, P. L. 65. The notice did not set forth in detail the items of labor and material, or the kind and character thereof, or the dates the work was done or materials furnished, or the prices therefor." This latter averment the claimant sub-contractors deny in their respective answers and, to the contrary, they all declare that "the petitioners had actual knowledge of the kind, character and amount of labor and materials furnished at the times the same were furnished, and that same were furnished under petitioners' personal supervision in the presence of petitioners, and that the cost thereof is a lump sum approved and verbally accepted by said petitioners prior to the commencement of the work * * *." No depositions were taken,—we assume because they would have been useless.

The foregoing rather comprehensive statement shows four questions to be involved in a disposition of the rules before us:

1. In view of the status of the proceedings on the sci. fas. in all four of the cases, is it too late for the defendant owners to move to strike off the claims?

2. In all the cases, was notice of filing the claim served upon Edward K. Bauer, as required by law?

3. Were the notices by the three sub-contractors of their intention to file claims, with respect to their setting forth "the nature of the labor or materials furnished," in sufficient compliance with the law? And

Mowrer et al. vs. Bauer et al.

4. Are the matters involved in the second and third questions such as appear on the face of the record and, therefore, sufficient to support motions to strike off? And of these in their order.

1. It has been held repeatedly that pleading to a scire facias waives all defects appearing on the face of the claim: *Fahnestock vs. Speer*, 92 Pa., 146; *Klinefelter vs. Baum*, 172 Pa., 652; *Wharton vs. Real Estate Investment Co.*, 180 Pa., 168; *Howell vs. Phila.*, 38 Pa., 471; *Mesta Machine Co. vs. Dunbar F. Co.*, *appel.*, 250 Pa., 472. As the entry of a plea, as required under the old practice, seems no longer necessary (*Wyss-Thalman, appel., vs. Beaver Valley B. Co.*, 216 Pa., 435; *Deeds vs. Imperial Brick Co.*, *appel.*, 219 Pa., 579; *Seellar, appel., vs. East End M. & T. Co.*, 58 Pa. Sup. Ct., 119, 128; *Brennan vs. Kennedy, appel.*, 69 Pa. Sup. Ct., 77), the filing of an affidavit of defense to the scire facias now operates as such waiver (*Fehr & Schock vs. Delp*, 15 North., 155), and the matters of defense set up in the petition may be heard upon the trial of the scire facias (*Clark vs. Bittle*, 19 Pa. D. R., 923). A motion to strike off a mechanics' claim for defects appearing on its face will not be entertained after an affidavit of defense has been filed upon the merits and the time has expired within which the claim could have been amended: *Bateman vs. McGarrigle Livery Company, et al.*, 25 Pa. D. R., 467.

We have, therefore, easily reached the conclusion that the rules to strike off must be discharged because they were obtained too late. The defendant owners have, by their own action, waived their right thereto and are now estopped from availing themselves of this particular remedy. This conclusion, if correct, obviates, of course, necessity of discussing the other three questions involved. We shall, however, for obvious reasons, set down most briefly our impressions concerning them.

2. Section 21 of the Act of 1901 required notice that a claim had been filed to be served upon the owner. This court, in *Roberts vs. MacPhee et al.*, 33 M. L. R., 185, on the authority of *O'Kane vs. Murray*, 25 Pa. D. R., 87, and 252 Pa., 60, held, in 1916, that service of such notice on an adult member of the family of the owner was not a sufficient

Mowrer et al. vs. Bauer et al.

compliance with the requirement of the act. By act of April 5, 1917, P. L. 42, however, Section 21 of the Act of 1901 was amended, whereby "the claimant, his agent, or attorney, may serve the notice upon the owner in any of the methods now provided for by law in the case of a summons." John A. Mowrer as one of the claimants in his own case, and as an agent for the claimant or claimants, in the other three, makes affidavit in each case that notice of filing was served by him on Edward K. Bauer, one of the defendant owners, at the latter's residence by leaving said notice with an adult member of his family. The Act of July 9, 1901, P. L. 614, Section 1, cl. 1, provides as one of the methods of service of a summons on an individual that a true and attested copy thereof may be handed to an adult member of his family, at his dwelling house.

No point is made here that the original itself was left instead of a paper of inferior credit,—a true and attested copy of it. But it is urged that such service, to have been effective, must have been made by the sheriff, as required by the last-cited act. This objection seems hyper-critical and is without merit. The Act of 1917 relates to the method of service and neither expressly, nor by necessary implication, does it require the same to be made by the sheriff. Quite to the contrary it says, in so many words, that such service may be made by "the claimant, his agent, or attorney." Furthermore, Section 8 of the Act of 1901, as amended by that of March 24, 1909, P. L. 65, provides that notice by a sub-contractor of his intention to file may be served on an adult member of the owner's family, or of the family with which he resides, if such owner resides within the county, and it is desirable that the practice as to the manner of service of both should be harmonious.

3. This question relates only to the three sub-contractors' claims. Section 8 of the Act of 1901 required notice of intention to be accompanied by a sworn statement, setting forth, amongst other things, "the kind of labor or materials furnished." Its amendment of 1909 now requires that the written verified notice shall set forth, amongst other things, "the nature of the labor or materials furnished." The word

Mowrer et al. vs. Bauer et al.

"kind" was changed by the amendment to "nature," which was not substantial.

Defendant owners allege that the notices in these three cases were defective and insufficient in that they failed in this respect by not setting forth "in detail the items of labor and material, or the kind and character thereof, * * *."

In the Patten case the notice was to the effect that the claimant made claim for "all painting and glazing work done on the said house;" Mr. Creed claimed for "the slate and metal work on the roofs of your home;" and the McKeemans for "all plastering work on the above house." The balance only that was claimed to be due was specified in each case.

It is urged by the claimants that this question is ruled against the defendant owners by the recent case of Ott vs. DuPlan Silk Corporation, appel., 271 Pa., 322, in which the claim of the sub-contractor plaintiff was for excavation work done in connection with the construction of the building and the validity of the notice of intention to file a claim was a subject matter of complaint. It had an itemized bill attached to it, showing the number of cubic yards of excavation, the unit price and the total sum claimed, but, notwithstanding, it was insisted there that the charges were not sufficiently specific. Mr. Justice Sadler, who wrote the opinion, in discussing this branch of the case and holding that the notice was sufficient, used the following general language: "It is argued that the failure to set forth in each item the particular kind of excavation for which the charge is made is a fatal defect. But the general nature of the work is designated. While a mechanic's lien is purely a creature of statute, and compliance with the provisions of the act permitting it to be filed is necessary to give it validity, this rule applies only to essential requirements (American Car Co. vs. Alexandria Water Co., 218 Pa., 520; Willson vs. Canevin, 226 Pa., 362), and the same exactness is not insisted upon in the notice as in the lien itself: Este vs. P. R. R. Co., 27 Pa. Sup. Ct., 521.

"The purpose of the notice is to inform the owner of the claim made, so he may protect himself in the manner provided by the act in making settlement with the contractor. It must, therefore, be sufficiently definite to fairly ap-

Mowrer et al. vs. Bauer et al.

prise of the service which has been rendered, and the charge made therefor. The only requirement is that 'the nature of the work' be set forth. In stating the claim was for excavation for a particular building, such information was given as enabled the owner to make proper investigation of the correctness of the demand. What was said by this court in Willson vs. Canevin, *supra*, is applicable here, and a like conclusion should be reached. See, also, Curti vs. Hartrick, 61 Pa. Sup. Ct., 447; Bennett Lumber & Mfg. Co. vs. Hartrick, 61 Pa. Sup. Ct., 456."

Moreover, Section 52 of the Act of June 4, 1901, P. L. 431, as was said in Mesta Machine Co. vs. Dunbar F. Co., *supra*, at page 477, "contemplates and provides for petitions, answers and replications, when applicable to relief under the statute, expressly stating that 'the facts averred by either party, and not denied in the answer or replication of the other, shall be taken as true in all subsequent proceedings in the cause, without the necessity for proof thereof' ". The claimant's answer (to which no replication or denial of any kind was entered) to each of the petitions to strike off in the three sub-contractors' cases, averred, as to the notice of intention to file claims, facts sufficient to have rendered it inadvisable to grant the relief now prayed for, had this been the only reason urged therefor, especially when the act provides so many more safe and less arbitrary methods of disposing of this question. Such may be accomplished at trial by motion for compulsory non-suit or binding instructions, or subsequently by motion for judgment in favor of defendant owners *non obstante veredicto*, or, affidavit of defense and replication having been already filed in each case, by motion by defendant for judgment on the whole record. Mansfield vs. Ocipa, 28 Pa. D. R. 121.

But, let it be clearly understood that, in our opinion, the sufficiency of the sub-contractors' notices of their intention to file liens is far from being free from doubt. In the Ott and Willson cases the notices were much more specific and informative than are those before us. Here the items and character of the work and material are not given and the contract price was evidently for a lump sum. It is not stated in any of the notices, however, which claim only a balance

Mowrer et al. vs. Bauer et al.

thereof to be due. What information, it may be asked, did the defendant owners derive from these notices to enable them to deal intelligently with the contractor and protect themselves?

It was held in Benton, appel., vs. David Berg Distilling Co., 63 Pa. Sup. Ct., 412, that a notice that the claimant had "furnished lumber used in the construction of the building" was insufficient. The same conclusion was reached in Conway vs. Sperry, 24 Pa. D. R., 540, where the specification was "labor and materials furnished toward the erection of said house, consisting of excavation and stone work;" in Ronalds & Johnson Co. vs. Rogers, 25 Pa. D. R., 25, where it was "plumbers' supplies, such as bath-tubs, water-closets, lavatories, sinks, wash-trays, etc.;" in Mansfield vs. Ocipa, 28 Pa. D. R., 121, where it was "lumber and hardware;" in Moss & Blakeley Plumbing Co. vs. Douglass, 64 Pitts. L. J., 111, where it was "installation of plumbing and gas fittings and the materials in connection with the same;" in Rodgers Sand Co. vs. P. R. R. Co., *ibid*, 300, where it was "sand and gravel;" in Eger vs. Douglass, *ibid*., 696, where it was "painting a house;" in Farina vs. Waters, 69 Pitts. L. J., 42, where it was "lathing, plastering and stucco work on said building, plaster paris, laths, neat plaster, skim and Keen's cement;" in Berger-Glass Co. vs. Haines, 7 Lehigh, 411, where it was "hardware and glass;" and in Chester L. & C. Co. vs. Mercadante, 14 Del., 491, where it was "lime, lumber, sand, flue lining, lath, hair, plaster and cement." See, also, Breitweiser Lumber Co. vs. Wyss-Thalman, 51 Pa. Sup. Ct., 83. These are all recent and well-considered cases.

Furthermore, there is another illuminating circumstance in this connection. The three sub-contractors evidently filed their claims at the instance of the general contractors to serve some ulterior purpose of the latter. The same counsel represent all the claimants; their four claims were filed on the same day; and John A. Mowrer, one of the general contractors, served all four of the notices of the fact of filing.

We purposely refrain from stating at this time our conclusion on the question now under consideration and have set down the foregoing, while the whole matter is before us, for the sole purpose of indicating that, notwithstanding Mr. Justice Sadler's general language in the Ott case, if its particular

Mowrer et al. vs. Bauer et al.

facts and the long and harmonious line of decisions, to but some of which reference has been made, are fairly and intelligently appraised, the question of the sufficiency of the notice here so far as their designation of the nature of the labor or material furnished, is concerned, appear to be in serious doubt.

4. Each of the three sub-contractors' claims contains an averment of when and how notice of an intention to file had been given to the defendant owners, but does not have attached thereto a copy of such notice. This was a sufficient compliance with the requirement of the act: *Thirsk, appel., vs. Evans*, 211 Pa., 239, 244; but the insufficiency of the notice, unless a copy thereof has been attached to the lien or incorporated therein, is a substantive defense on a matter dehors the record: *McVey vs. Kauffman*, 223 Pa., 125; *Ronalds & Johnson Co. vs. Rogers, supra*. See, also, *Mansfield vs. Ocipa, supra*, and *Parker vs. Denny et al.*, 27 M. L. R., 146; and cannot be taken advantage of on a motion to strike off.

Thompson, appel., vs. Radell, 42 Pa. Sup. Ct., 105, and many other cases decide that the requirement of the act that the claimant shall within one month after filing the claim file of record in the proceedings an affidavit setting forth the fact and manner of service of notice upon the owner of the filing of the claim is a prerequisite to the validity of the lien, and that, if it is not complied with, the lien will be stricken

Replying solely on the conclusion as to the first question propounded we are of the opinion that all the rules must off. See, also, *Christ et al. vs. Dubosky*, 261 Pa., 297. be discharged.

And now, 14 July, 1922, rules discharged.

In the Court of Common Pleas of Montgomery County.

John A. Mowrer and Joseph C. Mowrer vs. Edward K. Bauer and Bertha H. Bauer.

Frank S. Patten vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

Irving J. Creed vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

John W. McKeeman and Edmund McKeeman vs. Edward K. Bauer and Bertha H. Bauer, his wife, and John A. Mowrer and Joseph C. Mowrer.

Mechanic's liens were filed against defendants. Sci Fas. were issued on said liens to which defendants filed their affidavits of defense. Motions were made for rule to show cause why a supplemental affidavit of defense should not be filed and why the mortgagees should not be allowed to intervene as defendants and also for a rule to show cause why judgment should not be entered for want of sufficient affidavit of defense. The right to file a supplemental affidavit of defense is granted, because it is a matter of right.

The mortgagees ask to intervene as parties defendant, and make defense to the claims of the plaintiffs as if they had been originally named as defendants in the claim filed. The question is whether under Sec. 24, of the Act of June 4, 1901, the mortgagee is such a party as is entitled to intervene as a party defendant, whether they have such interest in the property to entitle them to such rights, the petitioners have such rights, and therefore, are entitled to intervene. As to the rule for judgment for want of sufficient affidavit of defense, the question would be for the jury to determine whether the work was being finished under a written contract or on a verbal contract, and as the wife has adopted or ratified her husband's contract in every respect as far as they affect her interest, judgment could not be entered against her for want of a sufficient affidavit of defense.

Nos. 120, 121, 122, 123. June Term, 1921.

Motion for judgments for want of sufficient affidavit of defense and also for right to intervene and to file a supplemental affidavit of defense.

F. A. Sobernheimer and L. W. Melcher, Attorneys for Plaintiffs.

F. K. Swartley and Larzelere, Wright & Larzelere, Attorneys for Defendants.

Opinion by Miller, J., July 14, 1922.

Reference is made to an opinion discharging rules to strike off, which is filed herewith, for the purpose of avoiding a restatement of many of the facts shown by the record. (See 38 M. L. R., 275.)

The writs, served on August 5, 1921, were returnable September 12th, following. The original affidavits of defense were filed on September 23d. Appearance of local counsel for the defendant owners in case No. 120 was not entered until April 15, 1922. None such was formally entered in the other three. On April 27th rules were granted in all the cases to show cause why supplemental affidavits of defense raising the question of the sufficiency of service of

Mowrer et al. vs. Bauer et al.

notice of filing the claims on Edward K. Bauer, one of the defendant owners, should not be filed. It is, therefore, at once apparent that these rules are not for an extension of time for filing original affidavits of defense, which may be granted only for cause shown and filed of record, but are applications for leave to file supplemental affidavits. Under the circumstances the rules should be made absolute, especially as we have already, in the opinion mentioned, discussed and indicated our view of, the merit of this defense, but so that it cannot be reviewed, wherefore the defendant owners should be allowed to raise this question at, or after, the trial and thus obtain a ruling thereon which may be reviewed. To allow the supplemental affidavits to be filed will make it possible for them to do so. Such is, therefore, done.

Roxborough Trust Company and Wilhelmina J. Cantrell, both of whom are mortgagees of the premises against which the mechanics' claims were filed, ask to be allowed to intervene as parties defendant. All four of these cases had been set for trial on Wednesday, April 26th, 1922, but the presentation of these petitions to intervene and the application by the defendant owners for leave to file supplemental affidavits of defense caused the trial to be continued. Under the circumstances, the questions of the validity of the liens and their relative priority with the mortgages are in dispute.

Both petitioners for leave to intervene claim to have "an interest in the property described in the liens" and in the actions thereon.

Answers were made by the respective claimants to the petitions of both. Mowrer Brothers, the general contractors, admit that petitioners hold the mortgages mentioned and are, therefore, interested in the property described in their lien, but deny such interest in the action brought for its recovery and their right to intervene as parties defendants therein. The three sub-contractors, in their answers, also admit that petitioners hold the mortgages mentioned, but neither admit nor deny that, by reason thereof, they are interested in the property described in their liens.

They expressly deny, however, such interest of the pe-

Mowrer et al. vs. Bauer et al.

tioners in the actions brought for their recovery and their right to intervene as parties defendant therein. All the claimants set up in their respective answers allegations of fact under which it is claimed by them that, even if the petitioners are found to have an interest in the actions mentioned and to enjoy the right to intervene as parties defendants therein, they are estopped by their own conduct from exercising that right. No replications were filed by the petitioners to the answers, but depositions in support of the petitions to intervene were taken. No depositions were taken by the claimants. We can see no merit in this contention on the facts now before us.

The proceedings on a mechanic's lien and the right of parties to intervene to protect their interests are regulated by statute. If one wishes to intervene he must pursue the manner pointed out in the statute: *Pagnacco vs. Faber*, 224 Pa., 18. Section 23 of the Act of June 4, 1901, P. L., 431 (which is constitutional: *Crane Co., appel., vs. Rogers*, 60 Pa. Sup. Ct., 305), extends to "any party having a lien against, estate in, or charge upon the property included in such claim," the right to file a petition attacking the claim, and praying an appropriate decree; and provides the method for disposing of the application. The Court is empowered to make such an order or decree as the facts shall warrant. This section provides further that like proceedings shall be had if the petition shall aver that the claim is for any reason invalid, has been paid, waived or released, or should not legally or equitably be allowed as a claim against the property.

Section 24 of the act provides that "any person having an interest in the property described in the claim, whether existing at the time of the claimant's contract, or acquired subsequently thereto" may be allowed to "intervene as a party defendant and make defense thereto, with the same effect as if he had been originally named as defendant in the claim filed."

An assignee of a mortgage is a proper party, within the meaning of Section 23, to avail himself of its provisions: *Crane Co., appel., vs. Rogers, supra*. This case and *Pagnacco vs. Faber, supra*, make it clear that both petitioners are parties within the contemplation of Section 23 of the act.

Mowrer et al. vs. Bauer et al.

But it is not so clear that they seek to avail themselves of its provisions. The facts averred by them indicate that such is the case, but they pray only to be allowed to intervene as parties defendant. They do not ask the Court to enter "appropriate decree," or, after the facts are found, in the manner directed thereby, to make such order or decree as they shall warrant. In other words, the petitioners do not seek to avail themselves of the summary relief which this section of the act provides, but, to the contrary, ask only to be allowed to intervene as parties defendant, as contemplated by the 24th section. The question arises, therefore, whether they, as mortgagees, are parties "having an interest in the property described in the claim" and thereby entitled to avail themselves of the provisions of the 24th section?

The first portion of the section, dealing with the right of intervention, omits the word "owner," whereas the latter, dealing with the right of the claimant to make substitution, allows him so to substitute "as a defendant * * * any person who may have acquired an interest as owner after the time of said contract." This would indicate that it was in the legislative mind to draw a distinction between the two classes whereby interest by way of ownership alone was not intended to be a pre-requisite to the right of intervention. Its purpose is to enable any one interested in the property to make any lawful defense to the claim. That a mortgagee is so interested would seem to be self-evident. If such were not the case, he would be helpless, for instance, in a case in which the claim had been filed after the recording of his mortgage under a fraudulent scheme between the owner and the claimant to defeat his priority. And, in any event, a mortgagee still technically holds the legal title to the land, subject, of course, to the mortgagor's equity of redemption.

Furthermore, the relief obtainable under Section 23 of the act may be wholly different from that provided by Section 24. Those not personally served by the writ may seek it either before or after judgment. In the last analysis such relief is more or less summary, complete and final in character. The Court makes such order or decree as the facts shall warrant. See *Crane Co., appel., vs. Rogers, supra*. Under the twenty-third section the attack is made on the claim,

or its priority of lien, alone, while under the 24th one allowed to intervene really defends generally against an effort to collect it. A mortgagee may, therefore, avail himself of the benefit of either section. This conclusion seems to be in harmony with the thought of Mr. Justice Mestrezat, when he says in *Pagnacco vs. Faber, supra*: "We think it equally clear that the petitioner has no standing to claim the right to intervene under the twenty-fourth section of the statute. The party authorized to intervene under that section is one 'having an interest in the property described in the claim * * * existing at the time of the claimant's contract or acquired subsequently thereto.' The petition filed by the title company for leave to intervene does not show that it was, at any time, the record owner of or held a valid title to the property the subject of the plaintiff's lien. The company does not show that it is even a mortgagee, or that it ever had such interest in the premises as brings it within this section of the statute. The words of the statute manifestly contemplate that the party entitled to intervene under these sections must have some estate or title in the property that will be affected injuriously by the enforcement of the lien. Hence, the act gives such a party a right to 'intervene as a party defendant and make defense thereto with the same effect as if he had been originally named as the defendant in the claim filed.'"

Ordinarily, of course, a mortgagee is interested in a mechanic's lien filed against the mortgaged premises only as it affects the lien of his security and it may be urged that he should be confined to the remedy provided by the twenty-third section of the act especially because, if he acts under the twenty-fourth, there may be some technical embarrassment in connection with the verdict and judgment. This may, however, be overcome by special verdict, or otherwise.

We note in passing that, on the face of the record, neither mortgagee is interested in any of the claims, because none of the plaintiffs claims to have acquired a lien on the premises earlier than July 8, 1920. Both mortgages were recorded on June 30th, preceding. The proceeds of both were, however, deposited with the insuring title company and paid out by it to the general contractors as the work on the building pro-

Mowrer et al. vs. Bauer et al.

gressed and all was so disbursed after July 8th. The rules to intervene should, in our opinion, be made absolute.

The rules for judgment for want of sufficient affidavits of defense are predicated on the premises, as set forth in the written brief of counsel for the claimants, "that defendant owners admit all the averments in the claims except those relating to the existence of the verbal contract under which the labor and materials were furnished; and the only defense made is that said labor and materials were furnished under a 'no lien' contract."

Let it be said, in an opinion already too long, that the most superficial inspection of the affidavits, original and supplemental, demonstrates this premise to be a false one, whereby the conclusion drawn from it falls. The outstanding disputed question of fact in all the cases is, of course, whether the contract was a verbal cost plus ten percentum one or the written agreement of June 30, 1920, fixing the flat sum as the cost of the work set up in the affidavits of defense. Under the pleadings, if the latter was the only and true contract it was as much that of Mrs. Bauer as of her husband. She makes no effort to escape responsibility, so far as her estate in the premises is concerned, by reason of the fact that the written contract was between her husband alone, as "owner in fee," and Mowrer Brothers. If the claimants are found to be entitled to recover at all it will be from the interest of both defendant owners in the premises liened. She joins in all the affidavits of defense and we find ourselves unable to follow the line of reasoning of claimants whereby they contend that "Bertha H. Bauer makes no defense whatever to these claims." On the contrary, she either adopts or ratifies her husband's acts so far as they affect her interest. In this respect she is unlike the wife defendant in *National S. & C. Co. vs. Fitch*, *appel.*, 55 Pa. Sup. Ct., 212. She, like her husband, is entitled to defend on the merits, and has done so.

Both have set up defenses in their affidavits that require the cases to go to trial before a jury. These rules must, therefore, be discharged.

We are pleased to observe that the net result of the conclusions which we have, under the facts before us and the law, felt compelled to reach in this and the other opinion filed here-

Mowrer et al. vs. Bauer et al.

with leave these four cases in shape for disposition in an orderly way before the only triers of fact under our law and with opportunity for hearing vouchsafed to every party so far shown to be interested in, or directly affected, by the result.

And now, 14 July, 1922, the rules to show cause why supplemental affidavits of defense should not be filed by defendant owners and Roxborough Trust Company and Wilhelmina J. Cantrell, mortgagees, should not be allowed to intervene as parties defendant are made absolute; and the rules for judgment against defendant owners for want of sufficient affidavits of defense are discharged.

**In the Court of Quarter Sessions of the Peace in and for
Montgomery County.**

**In re erection of County Bridge between Norristown
and Bridgeport.**

The County Commissioners presented their petition to the Court under the Act of Feb. 14, 1907, P. L. 3, wherein they alleged that the present structure was insufficient to accommodate the public travel and that a new and sufficient structure was necessary to take its place and asked for the approval of the Grand Jury and the Court. The Grand Jury made its report recommending the erection of the bridge with the further recommendation that the grade crossings be eliminated. The report was then before the Court for its approval or disapproval, but before taking any action the Court ordered a public hearing and under the Act which this petition was filed the only question for the Court to decide was the sufficiency or insufficiency of the proposed structure. Under the evidence as produced the proposed structure without the elimination of the grade crossings would not be a sufficient one to properly accommodate the travel, therefore, the hearing is continued until such time as proper arrangements are made for the elimination of the grade crossings.

No. . Sept. Term, 1922.

Petition for a bridge.

Freas Styer and Charles D. McAvoy, Attorneys for County
Commissioners.

Opinion by Swartz P. J., and Miller, J., Oct. 18, 1922.

The County Commissioners, on September 12th, submitted to the Court their petition, under the act of February 14, 1907, P. L. 3, setting forth that the existing county bridge at the place designated is not sufficient to accommodate the public travel, wherefore they had decided to erect a new and sufficient bridge to take its place, and praying for the approval of the grand jury and the Court.

The application was, on the same day, ordered to be submitted to the grand jury, which was then in session, and it was heard by them on the 15th, following. After hearing, and as appears by their certificate which is to be found attached to the original petition, that body approved of the proposition. It is remarked in passing that neither notes of the testimony heard by them, nor any plans of the proposed bridge, were returned to the Court with this report.

The grand jury, on the following day, submitted in open court their general report for the term. It also dealt with the same subject. So far as it related to the proposed bridge, it read: "After hearing the testimony of a great many of the citizens for and against the erection of the DeKalb street

In Re Erection of County Bridge

bridge according to a plan submitted by the County Commissioners, we recommend the construction of the bridge according to said plan, which is submitted with this report and marked 'A-1' to 'A-9,' inclusive.

"We also further recommend that the County Commissioners, before placing the contract for the erection of said bridge, obtain legal assurances from the Pennsylvania Railroad Company and the Philadelphia and Reading Railroad Company to change the grade of their tracks over DeKalb street so as to eliminate their present grade crossings in Bridgeport and Norristown."

When, therefore, the application next, in regular course, and as required by the act, reached the Court for its approval or disapproval, it did not have with it the testimony heard by the grand jury, any information concerning the estimated cost of the project, or specifications of its character, but it did have a plan of the proposed structure and the specific recommendation of the grand jury, contained in its general report, that certain railroad grade crossings should be abolished as an incident of its erection. Desiring to be fully informed before taking action in so important a matter, especially as the act requires the concurrence of judgment of the Court, the grand jury and the commissioners, before the project can be carried into execution, we, therefore, ordered a public hearing thereof before the Court and the same was held on Tuesday, October 10th.

Approval of such a project is not to be regarded as a mere perfunctory act. It imports the passing of intelligent and informed judgment, the use of discretion and a determination as a deduction therefrom. So long ago as 1811, it was said by the Supreme Court, in a road case (*Spear's Road*, 4 Binney, 174), that the Court, in judging of the report of viewers, were not restricted to the report itself, but might inquire by extrinsic evidence into the regularity and propriety of the proceedings. In a county bridge case (*Bedford Bridge*, 72 Pa., 42), the same Court said that the judicious selection of the site is essential to determine the question of expense, which is part of the duty of the Court, jury and commissioners. When a court of record is required to approve, a judicial discretion is implied (*Walnut street*, 24

In Re Erection of County Bridge

Pa. Sup. Ct., 114, 119), and, therefore, in reports upon building bridges, whether exceptions be filed or not, the conditions as expressed in the act must be affirmatively found by the Court. (Bethlehem Inter-County Bridge, 23 D. R., 818, and cases cited.) Also see Chestnut Hill & S. H. T. R. Co. vs. Montgomery County, appel., 228 Pa., 1, 6.

The hearing mentioned was largely attended and the Court heard much evidence of an informative character. The County Commissioners and their counsel were of course present and the testimony they offered was found by it to be very helpful. The same may be said of that of the witnesses who were heard in protest against the Court's present approval of the application. The outstanding facts, as developed at the hearing and not seriously in controversy, are as follows:

The Borough of Norristown, located on the Northerly side of the Schuylkill river, is the county seat of Montgomery County, and has a population of about 33,000. The Borough of Bridgeport, on the opposite side of the river, has approximately 3500 inhabitants. Together they constitute the nucleus of a much larger, rapidly developing industrial community, all of which may be regarded as suburban to Philadelphia. DeKalb street, extending across the river, is the second principal street of Norristown and the most largely used and principal one of Bridgeport. For its entire length, it is a portion of a primary state highway route which, in its course, passes through Doylestown, the seat of Bucks county, Norristown, that of Montgomery, and West Chester, the seat of Chester county. The travel upon it, especially between Main street, the principal thoroughfare of Norristown, which extends generally parallel to the river and, measured on DeKalb street, is about 900 feet northerly from it, and Bridgeport, is both general and local in character, comes from a widely extended territory, is here congested into a single flowing stream and now is very heavy and increasing rapidly in volume. DeKalb street is 66 feet wide between house lines and the changes in its grade between Main street, Norristown, and Fourth street, Bridgeport, some 1200 feet south of the river, are very slight or easy.

DeKalb street is carried over the river, which, from bank to bank, is about 600 feet wide, and a canal, which

MONTGOMERY COUNTY

In Re Erection of County Bridge

parallels the river and is about 100 feet to the southerly side of it, by a frame covered bridge which was erected by a private corporation upwards of sixty years ago as a toll bridge and afterwards became a county bridge through condemnation proceedings brought soon after the act of 1887 was passed. This bridge, which is the only public crossing between Port Kennedy and Conshohocken, consists practically of two structures laid side by side, each just wide enough to accommodate one-way traffic, with a path for pedestrians between. It is used by the local street passenger railway company which maintains a track in each side. This bridge, because of its type, condition and difficulty of access to it, now is, and for a long time has been, insufficient to accommodate the public travel.

The double tracks of the Schuylkill Valley division of the Pennsylvania Railroad Company, which are laid in the bed of Lafayette street, the first south of and parallel with Main street, Norristown, cross DeKalb street at grade, as do the double tracks of the Norristown division of the Philadelphia and Reading Railway Company, which are laid in the bed of Washington street, the second and only other Norristown street which is parallel with and south of, Main street. The passenger stations of both railroad companies are on the westerly side of DeKalb street and the freight station of the former is on its easterly side.

The tracks of the main line of the Philadelphia and Reading Railway Company cross DeKalb street at grade just northerly of Fourth street, Bridgeport.

It was established unquestionably at the hearing, largely by the testimony of the witnesses offered by the County Commissioners, that, in view of the character of DeKalb street and its use, the topography of the land in the vicinity, the great distance away of other public river crossings and the existence of the railroad grade crossings already mentioned, the building of a new and sufficient bridge at the location in question necessarily involves, as a feature thereof, the simultaneous elimination of the two Norristown railroad grade crossings, at the very least. All together constitute one inter-related, inseparable and comprehensive scheme.

The correctness of such conclusion is confirmed by not

In Re Erection of County Bridge

only the recommendation of the September Sessions Grand Jury, which has already been referred to, but also to the fact that at the June, 1922, sessions, the County Commissioners presented a similar application, which the grand jury then in service refused to approve,—strongly recommending in their report the erection of the bridge at such an elevation that all three of the grade crossings mentioned should be eliminated by its approaches.

The correctness of this conclusion that abolition of the dangerous railroad crossings is an inseparable and interlocking part of the bridge undertaking is likewise sustained by the fact that ever since, some two or three years ago, the County Commissioners first became active in this connection, they have been in continuous amicable negotiations with this end in view. As these negotiations have, as yet, not passed beyond the stage of discussion and suggestion, it serves no present purpose to enter into their details, but we have not failed to observe that, they have been so far conducted, almost exclusively, between the County Commissioners and representatives of the Pennsylvania Railroad Company alone. It may be ventured, however, that a successful and early conclusion of them savors more of hope than expectation. Why they have lasted so long was not explained.

The foregoing is a fair survey of the situation as it now confronts us and it must be at once apparent that it is replete with embarrassments and complications. No petition for a new bridge was ever presented by inhabitants under the comprehensive and applicable act of May 8, 1909, P. L. 494 (see Chartiers Creek Bridge, 37 Pa. Sup. Ct., 281; 48 *ibid.*, 106; 235 Pa., 365; and Bethlehem Inter-County Bridge, *supra*), as was done in connection with the recent construction by Montgomery County of the very satisfactory bridge over the Schuylkill river at Conshohocken. The Commissioners, therefore, after having spent nearly three years in consideration of the project and in the negotiations mentioned, filed their own petition under the much less effective Act of 1907, *supra*.

It gives us pleasure to say that we are satisfied they are sincere in their purpose to serve the public need.

The application comes before the Court for its approval

MONTGOMERY COUNTY

In Re Erection of County Bridge

at a time when there is a crying need for action, because of the pressing necessity for relief. Public interest is fully awakened. But, reduced to its essentials and stripped of all promises, hopes and expectations, it, under the law, consists only of a prayer that the Court approve the erection of a low-level, bank-to-bank bridge, with short approaches, which extend in either direction but a short distance toward the grade crossings, with entrance to it blocked, or, at the least, with access to it seriously interfered with, by those dangerous crossings.

Mindful of the facts that a new county bridge is a permanent improvement intended to serve the public for many future years; that public travel on DeKalb street is now very heavy and increasing rapidly; that interference with it at the present grade crossings is dangerous, almost intolerable and likely to grow worse; and that it has long been the wise policy of the law that such crossings should be abolished whenever reasonably possible; we have, after mature consideration, with much reluctance, and for the reasons given, finally concluded to withhold, for the present at least, action on the project, as it is now presented to us, in the hope that the effect will be to speed the ultimate building of a satisfactory bridge.

In thus holding the matter for further and final consideration, it is not intended to intimate whether, in our opinion, a high-level bridge, the approaches of which will cross the railroads above grade, or one of low-level, with but short approaches, should be built. This is a question to be decided primarily by the County Commissioners with the aid of their skilled engineers, and we have no disposition to quarrel with their conclusion. It may also be conceded that, under the law generally, after the erection of a county bridge is once lawfully authorized, the discretion of the commissioners is absolute with respect to its size, plan and the location of its piers or abutments. This is so because the Court inquires usually only into the necessity for the bridge and its probable cost. But by the act of 1907, under which the commissioners have seen fit to proceed, the question now before us is primarily, not as to a preference between a high-level or low-level bridge, or the manner of its construction, but as to the sufficiency of the proposed bridge to accommodate public

In Re Erection of County Bridge

travel and that question must be considered in view of all the surrounding circumstances which may affect its use. The existence of the grade crossings in question is one of these circumstances. When so considered, we are not convinced that the bridge proposed is sufficient. Definite and enforceable provision must, in our opinion, be made for the abolition of the two crossings in Norristown, at the very least, before the county is committed to the building of the only style of bridge that is now before us for consideration.

It is felt that, no matter how sanguine the Commissioners may be concerning the future removal of this objection, it is under the method they are now pursuing, fraught with great difficulties, embarrassments and possibilities of both failure and delay. Under the present proceeding there is no direct or legal connection between the building of the proposed bridge and the elimination of any of these crossings. The commissioners, to the present time, are, therefore, acting as mere volunteers in their negotiations. Their sincerity of purpose is unquestioned and is to be commended. But it is understood that the companies will voluntarily embark in the enterprise, so far as their Norristown crossings are concerned, only on condition that many other such crossings are abolished at the same time and as an incident of the same undertaking. This involves the closing, and possible vacation, of many streets and the prevention of convenient access to much valuable property in the borough. Norristown, as a municipality and deeply interested as it is, has to the present time, had no part in the negotiations having this object in view. Owners of property injured also may desire to be heard. Furthermore, any arrangement that the railroad companies may enter into in this connection must, by their terms, wait upon their financial convenience before it can be carried into effect.

The Public Service Commission is vested with great power in connection with the abolition of grade crossings and, in fact, it has exclusive jurisdiction over the subject. Even if the County Commissioners and the two transportation companies should eventually succeed in coming to an understanding amongst themselves as to what shall be done in connection with the elimination of these crossings and an apportionment of its cost, their agreement, before it becomes effective,

MONTGOMERY COUNTY

In Re Erection of County Bridge

must be approved by the Commission. Before such approval can be obtained, it is reasonably to be expected that the State Highway Department, the borough and all interested property holders will be afforded an opportunity to be heard. All this will take time and at the rate of progress already made it may be years before anything of a definite and concrete character will be accomplished. Until that time, it is very clear that a bridge over the river of the type now proposed cannot be a sufficient bridge. If the proceedings are kept separate, the grade crossings must, therefore, be abolished before the bridge can be authorized and we know of no reason for further delay in asking the Commission for this relief.

The foregoing has been written at this time in the hope that the County Commissioners may understand clearly our views, that they may be found helpful by them and that matters may be expedited. An adequate new bridge is a great public necessity and should be built without further delay.

But the bridge proposed, if built under existing surrounding conditions, would, however, give little, if any, relief to the continuously flowing stream of public travel that could not be afforded by the strengthening and repair of the one which is now standing, if such is reasonably practicable.

Sufficient is it now to say directly and without qualification that the Court is prepared to act on the application now before it, and then promptly to approve it, upon being reasonably assured that, by the building of the bridge proposed, concerning the estimated cost of which we are vouchsafed no information, however, public travel will be accommodated and that it will be a sufficient bridge within the meaning of the Act. The essence of this assurance must be, of course, that the Norristown crossings, at the least, are to be eliminated, not as a future hope, but as an accomplished fact.

In view of the testimony at the hearing we deem it proper to say a few words concerning the condition of the existing bridge. That it is insufficient to accommodate public travel is, as already stated, admitted. Certain witnesses who were called by the County Commissioners went further, however, and testified that it had been allowed to fall into a state of decay, and, in consequence of its weakened condition, and for some time, stringent rules regulating traffic upon it have

In Re Erection of County Bridge

been enforced. This has cost, and is costing, the taxpayers heavily because of the number of watchmen employed. Other testimony in the case and the fact that it has become necessary so to regulate traffic, demonstrates that the Commissioners believe the present bridge to be unsafe. Examinations of it have been made at their instance. To the present time, however, no repairs have been made or attempted, nor has any estimate of the cost of such repairs been obtained, because the Commissioners take the position that the bridge is so far beyond possibility of being made safe that, in their opinion, the cost thereof would be prohibitive. This attitude seems, however, to lose sight of one of their elemental duties.

In *Com. of Penna. ex rel. vs. Bird*, appellant, 253 Pa., 364, the lower court observed of the bridge there involved that it "is in an admittedly dangerous condition, and is located upon one of the main principal roads of the county. The condition of this bridge is such that it requires the immediate attention of the proper authorities to make the same reasonably safe for the accommodation of public travel;" and its order or judgment, which was affirmed by the Supreme Court, awarded a peremptory mandamus against the County Commissioners requiring them to construct, maintain and keep in repair the bridge in question so that the same should be reasonably safe for public travel until such time as it should be rebuilt by the county. The performance of a positive official duty such as this cannot be disregarded with either safety or impunity.

But is the present bridge unsafe, or, as better phrased, what is its actual condition? It has been in continuous use by the public for over sixty years, during upwards of the last twenty of which it has carried a street passenger railway line. The cars of the latter are heavy, as are the loaded trucks of the present day. The Commissioners did not have it examined until after the June Grand Jury had reported adversely. They now testify that the result of such examination was to disclose that the bridge is decayed, weakened and beyond repair. But, ever since, it has been in constant use by the street railway company and the public, with no change in the situation except enforcement of the traffic rules already mentioned. No witness at the hearing was prepared to give us any depend-

In Re Erection of County Bridge

able information as to the real condition of the bridge or, if it can be strengthened and repaired, the cost thereof. This was as much the duty of the objectors as it was that of the Commissioners. We are left without satisfactory information on this very important aspect of the case.

It would be short-sighted and unwise to build the bridge now proposed and to leave the intolerable grade crossings remain if the old bridge can be temporarily made reasonably safe for public travel. It may be necessary, however, to approve it against our own better judgment and the unanimous sentiment of the community if the latter is impossible. We desire to act promptly and assume no responsibility for any further delay, but our action must, of necessity, be postponed until the Court is informed on this subject.

The cost of a thorough, impartial examination and investigation of the condition of the old bridge and obtaining an estimate of the cost of strengthening it, if such is feasible, should not be a serious burden, especially if properly distributed, nor should it take much time, and the citizens of the community, who are directly interested, should consider the advisability of aiding the Court by having such done promptly. The Commissioners may see their way also to help us. We entertain the hope that, in the very near future, and from sources in which we have confidence, it may be made possible for us, to act intelligently in this connection.

We state broadly, by way of summary of the foregoing, that:

A. In order that any new county bridge over the Schuylkill river at DeKalb street may be sufficient to accommodate public travel, the dangerous railroad grade crossings on that street in Norristown, near the entrance to the bridge, at the very least, must be simultaneously eliminated.

B. It is an imperative duty that the present bridge be kept reasonably safe for public travel pending the build-of the new.

C. Notwithstanding "A" and "B," our own better judgment and what appears to be almost unanimous public sentiment against it, it may become necessary to approve the proposed low-level, bank-to-bank bridge and allow it

In Re Erection of County Bridge

to be built before the above-mentioned grade crossings are ordered to be abolished. Such will be done, however, only under that compelling public necessity which will result from its being shown to us that the present bridge has been allowed to fall into such a state of decay that its temporary repair and strengthening, so that it may be safe for public use, are beyond the realm of reasonable possibility.

And now, 18th October, 1922, hearing continued, or adjourned, without date, and the petition or application is held until such time as the County Commissioners are prepared to satisfy the Court that, by the elimination of railroad grade crossings, reasonable and convenient access to the bridge which they propose to erect has been made possible, whereby it may be deemed by the Court sufficient to accommodate public travel; or until we are convinced by the reports of competent and impartial engineers, which should be submitted promptly, that the old bridge is incapable of being reasonably safe for use by the public pending the obtaining of an enforceable order or approval from the Public Service Commission for abolition of at least the Norristown railroad grade crossings, and an apportionment of its cost amongst the interested parties.

In the Court of Common Pleas of Montgomery County.

Nathan Goldfine vs. Sophia F. Miller and Carl Miller.

A and B entered into a partnership. C, the wife of B, joined in with B in a judgment note to A. Subsequently A assigned the judgment note for value and the assignee entered judgment. C filed her petition for rule to show cause why the judgment should not be opened as against her and she be let into a defense. The depositions furnish considerable conflicting evidence as to the real transactions in which C, along with B, became makers of the note, but the evidence is such that there are sufficient questions of fact raised for a jury to decide, first, whether any money was really paid in consideration of the note, and the money if paid, whether it was a loan to the wife for her personal use, or whether the husband was the real debtor.

The rule to open must be granted and the wife let into a defense.

No. 127, February Term.

Rule to show cause why the judgment should not be opened as to Sophia F. Miller and she be let into a defense.

Theodore Lane Bean, Attorney for Petitioner.

Witkins & Egan, Attorneys for Plaintiff.

Opinion by Swartz, P. J., October 31st, 1922.

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

The case was heard and argued upon petition, answer and depositions.

(1) The evidence is so conflicting that it can not be reconciled as to some of the issues raised. It is evident that one or more of the witness whose depositions were taken told that which was false.

(2) Nathan Goldfine and Carl Miller entered into partnership, under the name of Woodbury Motor Truck Company, to sell motor trucks. Carl Miller had no money to put into the business. Nathan Goldfine advanced over \$3,000, but the evidence indicates that some part of this money was furnished by his brother, Reuben Goldfine.

(3) The judgment note in question, for \$1,000, bears date July 24, 1919, and purports to be signed by Sophia F. Miller and Carl Miller, under their hands and seals.. It was made payable, one day after date to the said Nathan Goldfine.

(4) On April 20, 1920, Nathan Goldfine sold the note, and assigned and transferred all his right, title and interest in the same to his brother-in-law, Henry Martin. Nathan says he sold the note for \$600, and that as soon as the money was received he turned it over to Reuben Goldfine, on account for money due him.

(5) After the partnership was formed, the firm purchased two trucks from a Reading dealer, for about \$3500. Nathan claims that he furnished the cash to pay for the two trucks. About four months later the firm bought two more trucks from the same dealer. These were purchased with the proceeds of the sales of the first two trucks. They were in the custody of Carl Miller, at the place of business of the Woodbury Motor Truck Company.

(6) Reuben Goldfine told Mr. Miller that he had a customer for one of these trucks and that Miller should bring it down. He did so, and, apparently, in the presence of Miller, a sale was made to a stranger, but no money was realized. The next day Reuben sent word that he had a customer for the remaining truck, and that too was sent down.

(7) After Reuben obtained the custody of the two trucks he caused an execution to be issued on a judgment note given to him by the Woodbury Motor Truck Company, signed by Nathan Goldfine, as treasurer. The sheriff sold the trucks.

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

Reuben also attempted to sell, on said execution, a third truck, which did not belong to the firm but was in the custody of Carl Miller.

(8) We must admit certain evidence that was taken under objection. It throws light upon the financial dealings that Reuben had with his brother Nathan and the Woodbury firm. It shows that Reuben must have advanced money to Nathan for the Woodbury Motor Truck Company, otherwise why should Nathan confess the judgment in the names of the partnership.

Reuben's financial relations with the Woodbury Company become important when we consider the evidence of Mrs. Miller in connection with her signature of the \$1,000 judgment note in question.

(9) She says that her husband insisted she should sign the note for \$1,000; that she refused; that her husband talked cross to her; that she was in tears and hardly knew what was on the note when she signed it. She declares that Reuben Goldfine stated to her that "Nathan and her husband were going into partnership, and that he needed a little security;" that if they she signed the note that nothing would happen; "if they did not make out good" that the note would be returned to her; that she then signed the note.

(10) She was questioned again and again as to the purpose of her signature, and she repeated that Reuben said she should sign the note, that Nathan and her husband went into partnership and that he wanted a little security.

(11) Reuben Goldfine, according to his evidence, had many financial transactions and bank dealings. His business experience was far more extensive than that of his brother Nathan. Whether he wanted security for himself or for his brother is not so clear. Mrs. Miller evidently understood that she was to become security for Reuben, if she tells the truth.

(12) Carl Miller says in his deposition, that Reuben insisted that he, Miller, must provide security, because his brother Nathan furnished \$3,000 for the firm and that Miller had made no contribution.

(13) Reuben asked Miller whether he owned any property; he answered that he had none, but that his wife had property in her name. Reuben proposed that she should sign

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

a note. Mr. Miller answered that she would not sign and that he did not want his wife to sign. Reuben answered,—I will go up with you and talk it over with her. Mr. Miller says his wife then signed the note as surety for him and thereupon Reuben gave him \$200 to make good a check that he, Miller, gave out in Reading, as down money on the first truck purchased. This is the story in Carl Miller's deposition.

(14) Mrs. Miller admits that she signed and sealed the note and delivered it to Reuben Goldfine. Mr. Miller would not say that he signed the note, but does not dispute his liability on the same, nor did he join his wife in her application to open the judgment.

(15) The plaintiff and his two witness Reuben Goldfine and Oscar Goodman, declare that the note was signed in the home of Nathan Goldfine, No. 318 N. American street, Philadelphia, and not at Bala, Montgomery county, as testified to by Mr. and Mrs. Miller.

(16) The plaintiff declares that he loaned the \$1,000 and gave the money to Mrs. Miller; that she and her husband signed the note in question when Mrs. Miller received the cash.

(17) Reuben Goldfine corroborates this statement of his brother, and Oscar Goodman says he was in the room at 318 N. American street, on the occasion when the two Goldfines and Miller and his wife were present, and that he saw some money on the table and some in the hands of Mrs. Miller.

DISCUSSION.

We have given the claims of the respective parties in this controversy. At this time it is not within our province to find the facts or to determine who is telling the truth. These are matters for a jury if an issue is awarded.

Mr. and Mrs. Miller swear that the wife's signature on the note was obtained as a surety. The wife is not very clear whether it was security for Nathan or Reuben or her husband. She is clear, however, that she signed because Reuben wanted some security. Whether she was surety for one or the other is immaterial. She can not, under the law, become surety on a note for "another." In a sense, her signature to the note was a security, according to her version, for Nathan, or even Reu-

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

ben, if he was to become the beneficiary under the note, as indicated when he took from Nathan all the money he realized in the sale of the obligation.

The wife was a surety for her husband, according to his declaration. If they are believed there can be no question as to this point.

Nathan's testimony was given to support the claim that he made the loan to Mrs. Miller. His brother corroborates this version of the transaction.

Whether any weight should be given to the testimony of Oscar Goodman is also an open question. He did not know Mrs. Miller, had never met her before this day. He only saw the side face of the woman in the room. Three years afterwards, without having his attention called to the matter in the meantime, Nathan sent word to him to appear at Norristown and tell what he saw in the room on that day. A reading of the testimony may indicate that Nathan reminded him what he was expected to say. Carrying the harness from the stable, where it belonged, into the second story of the house where Nathan lived, may indicate an unusual transaction. Standing at the door, looking in, and viewing the side face of a woman, might be regarded as a weak basis for an identification of that woman, three years later.

The husband and wife now constitute two witnesses in giving parole evidence: *Guernsey vs. Froude*, 13 Pa. Superior Ct., 405.

The story of the transaction given by Mrs. Miller and her husband may appear to a jury more reasonable and persuasive than that given by the plaintiff and his brother.

Why should Nathan lend \$1,000 to the wife of his partner who had furnished not a single dollar to the firm? This is a question that a jury might ask.

Did Nathan have money to lend to any one? Reuben helped the firm to pay \$200 down money for the first trucks. In a short time the sheriff sold out the partnership property to repay the advances made by Reuben and a little later Nathan was so hard pressed that he had to sell the judgment on record, of the face value of \$1,000 for \$600. This judgment was apparently a good and valid obligation, if his version of the signing of the note is correct.

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

On the other hand a jury may find that the story given by the wife and her husband is a natural and reasonable occurrence, such as might be expected where a wife has property and her husband has none, nor money to contribute to a partnership he is anxious to form. The wife, when hard pressed, is likely to append her name to a note to help her husband.

Reuben was the banker; he drew out this \$1,000, gave the cash to Nathan, who carried it about on his person for some days, then gave it to Mrs. Miller to take to Bala, Montgomery county. Trucks were bought with certified checks but Reuben, with his large banking experience, seems to have forgotten on this occasion, the use that is ordinarily made of checks.

But suppose Nathan paid over the money into the hands of Mrs. Miller; still the question arises, was the loan made to the husband?

The law will not tolerate any device adopted to evade the express statutory enactment. The fact and not the form of the transaction will determine the wife's liability: *Real Estate Co. vs. Roop*, 132 Pa., 496; *Patrick & Co. vs. Smith*, 165 Pa., 526; *Jaquett vs. Allabaugh*, 16 Pa. Superior Ct., 557.

We think the circumstances surrounding the alleged loan and the explanations made by Nathan and his brother, raise the question whether the \$1,000 note in fact represented a loan to Mrs. Miller, even under the plaintiff's version of the transaction.

We shall recite the exact words of the witnesses. Nathan testified: "Mr. Miller asked me if I could do him a favor, he 'got to settle some mortgage or something, and he asked me 'to loan her the money because she has got a lot in New Jersey or somewhere and he needs \$1,000, and as soon as he sold 'the property he would pay me off and he is going to pay the 'interest and the money and everything. Mr. Miller was after 'me for three weeks."

Who, under this testimony, was to become the debtor? Carl Miller wanted the favor; he had to settle some mortgage; he needed \$1,000; he would pay me off, he would pay the interest and money and everything; he was after me for three weeks. What inference will a jury draw from these expressions?

Nathan Goldfine vs. Sophia F. Miller and Carl Miller

Reuben's deposition was somewhat in the same line. He said: "Mr. Miller came down to the stable and we went up to Nathan Goldfine's house and he told me I should make out a note for \$1,000. He said the property belonged to his wife, and that was why his wife would sign it. I went up and made out the note and Mr. and Mrs. Miller signed it."

Here again, the jury may find that Mr. Miller was the borrower and that the wife signed as surety because the property belongs to her.

In testing the liability of the wife under the evidence, where her name is affixed to a note, the question always rises, "Who is the principal debtor?" We must consider the wife's relation to the note and to the indebtedness: Yeany, to use, vs. Gold Standard National Bank, 256 Pa., 135.

Under the deposition of Nathan Goldfine the inference would be justified, that Mr. Miller was principal debtor on this note, and that his wife the surety to the holder.

We are aware that where husband and wife sign a note they are prima facie joint debtors with all the legal incidents of joint indebtedness. It is also true that the burden is on the wife to show that she acted as a surety in signing the note: Bank vs. Poore, 231 Pa., 365. She meets the burden when she shows by a preponderance of the evidence, that she signed as surety for the husband.

We must bear in mind that she makes no attack upon the note itself or her signature to the same. She contends that it is voidable as to her because she signed as a surety for her husband. Her testimony is corroborated by her husband who speaks as an additional witness, although he is an interested one. She does not rely solely upon the direct evidence of herself and her husband, but she pleads also the facts and circumstances surrounding the case as corroborating her contention.

We conclude that the evidence is insufficient to open the judgment and raise the issues,—

First, whether any money was paid, as a consideration for the note, as claimed by the plaintiff; and,

Secondly, if the money was loaned by the plaintiff at the execution of the note, was the husband or the wife the debtor?

Horning's Estate

And now, October 31st, 1922, the rule to open the judgment as to Sophia F. Miller to allow her to defend is made absolute. The parties will frame the issue or issues for the approval of the Court.

In the Orphans' Court of Montgomery County.

Estate of Samuel B. Horning, Deceased.

Decedent died leaving a last Will and Testament in which he gave his widow a life estate. The widow claimed the entire estate under a paper writing claimed by her to be a binding contract upon decedent. Some years prior to decedent's death a verdict was obtained for injuries sustained by decedent's widow, the proceeds of the verdict were then used by the decedent, and on these grounds the widow claims that this is a binding contract on decedent, so that his entire estate should go to her.

The testimony as produced, however, show that decedent had given a property to his widow, and that she had made various declarations that this was in full payment of what he owed her. If the paper writing was a binding contract it was discharged by the conveyance of the real estate to her and the paper writing as a will was replaced by one executed later, the contents of which the widow had full knowledge of prior to decedent's death.

The exceptions to the adjudication are accordingly dismissed.

No. 36, January Term, 1922.

Exceptions to adjudication.

William F. Dannehower, Esq., for accountant and testamentary trustee;

N. H. Larzelere, Esq., for Laura M. Horning, widow;

Evans, High, Dettra & Swartz for Mae M. Horning, Bertha Dunlap and Reinard Horning, legatees;

Thomas Hallman, Esq., for Alice Halfmann, a legatee;

Norman W. Harker, Esq., for Elizabeth K. Howell, legatee;
and Elizabeth, George, Charles and William Howell, her grandchildren.

Opinion by Solly, P. J., June 5th, 1922.

At the audit of the executor's account the testator's widow, Laura M. Horning, claimed the entire estate for distribution upon an alleged parol contract made in 1914 by her husband to give her his estate by will. The claim was objected to by all the other parties interested in the estate, which cast the burden upon the claimant to establish the claim by clear and convincing evidence.

To prove the making of the contract she relied upon the testimony of Evan B. Lewis, Esq., the attorney who represented her in securing from her husband a sum of money he

Horning's Estate

received for her several years before in settlement of a verdict recovered against a traction company for personal injuries sustained. To show performance of the contract she produced a paper of the date of March 24, 1914, in the handwriting of the decedent and signed by him, clearly and unquestionably a will or testamentary instrument, which stated, if anything happened to him, everything (his estate or property) should go to his wife, giving as the reason for such disposition of his estate that he had her money since January, 1897. If the evidence established the making of the contract in consideration of the claimant relinquishing her right to the money received by her husband from the traction company, it would be binding on him and enforceable. *Brinker vs. Brinker*, 7 Pa., 53; *Logan vs. McGinnis*, 12 Pa., 27; *Johnson vs. McCue*, 34 Pa., 180; *Smith vs. Tuit*, 127 Pa., 341; *Shroyer vs. Smith*, 204 Pa., 310; *Conlan vs. Conlan*, 20 Pa. Sup. Ct., 45; *Lewallen's Estate*, 27 Pa. Sup. Ct., 320.

The parties opposed to the allowance of the claim contended that the proof of the contract failed; but, if proved by clear testimony, it was terminated and abrogated by the parties in November, 1914, and the subsequent acts and declarations of the claimant following the purchase of a dwelling house in Norristown by her husband, and having the deed made to her, her presence at the time her husband gave instructions for the making of the will probated after his death, some of which instructions she suggested and he followed, and her recognition of the probated will by receipt of some of the estate therein given her, notwithstanding she had in her possession the paper writing of March 24, 1914. A number of witnesses were called by them and examined at length. They testified to acts and declarations of the decedent, after March 24, 1914, in the presence of his wife, and to her acts and declarations before and after his death, all for the purpose of establishing the contention that the contract was considered terminated and ended by the claimant, and considered by her as no longer in existence until December, 1921, several months after the husband's death.

After a careful and painstaking examination and consideration of all the testimony both in support of and against the claim, we found that it did not clearly establish the parol

Horning's Estate

contract set up by the claimant; namely, that her husband had covenanted to make a will giving her his entire estate at his death; but if such contract was clearly proved, and the paper of March 24, 1914, was its fulfillment, it was satisfied, terminated or abrogated by the parties in the decedent's lifetime, and the claim was accordingly disallowed.

The widow has filed twenty-three exceptions to our findings and conclusions, which may be embraced under two general heads; one, error in finding that the parol contract had not been proven; the other, error in the findings of fact concerning the acts and declarations of the claimant after the making of the alleged contract and the will of March 24, 1914, and subsequent to his death, and to the conclusion drawn from such findings that the contract, if it ever existed, had been terminated and satisfied in decedent's lifetime.

The able and exhaustive argument of claimant's counsel and our review of the testimony, has failed to convince us that that substantial error was committed in rejecting the claim. The testimony of Mr. Lewis at most established that the decedent and his wife had settled their differences over the money which he received for his wife from the traction company, and that both declared he had made a will giving her all his estate. He did not, and it is but fair to conclude, he could not, testify that the decedent had contracted to make a will in consideration of his wife permitting him to retain as his own the money he received for her from the traction company, because neither party when together at his office made such statement. We said in the adjudication that the claim was not based on a post nuptial contract. By that we meant a contract made by the decedent and his wife concerning the rights of each in the property of the other because they had agreed to live separate and apart—a mutual separation. Of course, the contract here claimed upon, if proven, would be a post nuptial one, because it was made after marriage. We may have erred as to our statement that the claimant received a certain amount of government bonds, but that was harmless. The testimony showed that she stated she had received some government bonds. Whether she had been paid in full consideration for what her husband owed her was not material to the

Horning's Estate

issue. That was a matter for the parties themselves. The Norristown house was conveyed to and accepted by her.

Every act of the claimant from November, 1914, to December, 1921 (when for the first time after her husband's death she produced the paper of March 24, 1914), as the weight of the testimony established was consistent with our conclusion that the contract on which the claim is made had been satisfied and terminated. Her participation in the making of the probated will, her suggestions as to who should be a beneficiary or beneficiaries thereunder, her recognition of the will by receiving the household goods bequeathed to her, receipting to the executor for them as a bequest, her receiving the income bequeathed to her and receipting for the same as coming to her under the will, all show she considered the contract she now sets up terminated, of no virtue after November, 1914. Conceding her failure to mention the existence of the paper of March 24, 1914, at the time the probated will was prepared and executed should not weigh against her the fact that she did not notify the executor within a reasonable time after her husband's death of its existence, and that she claimed the entire estate under it by virtue of the contract she now alleges her husband made, is entitled to weight in determining the question before us. The testimony shows that the executor had no knowledge of her claim, the contract, or the paper of March 24, 1914, until sometime in December, 1921.

We think the findings and conclusions are sustained by the weight of the testimony and the claim—which savors of afterthought—was properly rejected.

And now, June 5, 1922, after argument and mature consideration the exceptions are dismissed and the adjudication is absolutely confirmed. An exception is granted the exceptant to this final decree and bill sealed.

In the Court of Common Pleas of Montgomery County.**Rippman vs. Rippman.**

Libellant filed his petition for divorce on the grounds of desertion. The respondent and libellant had disagreed, whereupon an agreement of separation was made in which the libellant paid for the support of the respondent, subsequently the respondent was charged with larceny, and in order to escape jail, fled from the jurisdiction. The desertion as set forth in the petition states the original date of separation as the time it took place. The evidence does not show that this separation was wilful and malicious and if it was not the final fleeing from the jurisdiction, does not give rise to sufficient grounds to supply the malicious, wilful intent to desert.

The libellant cannot be allowed to amend his libel as to the time set for the wilful and malicious desertion.

No. 58, September Term, 1921.

Divorce.

Desertion.

Elgin H. Lenhardt, Attorney for Libellant.

Opinion by Swartz, P. J., October 31st, 1922.

The libellant and his wife resided in Norristown with the parents of the libellant. The wife's conduct toward her mother-in-law was very bad. It culminated in a blow with the fist in the face of the mother-in-law.

A family consultation was held to devise plans to relieve the unhappy situation. The wife said she would go away from the home and the husband promptly offered to rent for her use suitable rooms in Norristown and give her a weekly allowance for her support. He secured the rooms; the wife took possession, and the husband paid the rent and weekly maintenance. This separation continued from December 29, 1918, until "Sometime in the spring of 1920."

The husband made no efforts to provide a home away from his parents and made no offer to renew cohabitation with his wife. He was well satisfied to have the amicable separation undisturbed.

In the spring of 1920 the wife was charged with larceny of certain articles belonging to her neighbors. A warrant was issued for her arrest, but before she could be apprehended she escaped, and went as far as California. She never returned to her husband or to Norristown.

The Master finds that the separation, on December 29, 1918, was not a wilful and malicious desertion. His careful application of the law to the facts found by him leaves no room to question his conclusions. He finds, however, that her de-

Rippman vs. Rippman

parture in the Spring of 1920 to escape arrest and her failure to return after the lapse of two years, constitutes a wilful and malicious desertion of her husband.

The evidence shows that the sole purpose in changing the existing relations between the husband and wife was to escape arrest. She was satisfied to enjoy the home and support provided by the husband. She failed to continue in the amicable relationship, not from any desire to widen the breach between herself and her husband, but to escape imprisonment. If the existing separation was not wilful and malicious how could her theft and the consequent warrant of arrest arouse malice against her husband?

The intent to desert the husband is the important criterion in the complainant's case. Here the intent was to escape jail and not to desert the husband.

But if we are in error in holding that there was no wilful and malicious desertion of the husband by a separation to escape arrest and imprisonment, still the husband is confronted with another difficulty. He alleges in his libel that the wilful and malicious desertion began on December 29, 1918, but his proofs, even if sufficient, show that the desertion did not begin before the Spring of 1920. The allegata and probata as to the time of the desertion do not agree by about one year and four months. This is fatal to the application; *Smith vs. Smith*, 15 Pa. Superior Ct., 366.

We passed upon this requirement of the libel in several reported cases. There must be a substantial agreement in the proofs and allegations as to the time of the desertion; *Mann vs. Mann*, 32 Montg. Law R., 165; *Oxnam vs. Oxnam*, 36 Montg. Law Rep., 56; *Crabtree vs. Crabtree*, 37 Montg. Law Rep., 145. Other Courts have insisted upon this agreement as to the time of the desertion alleged in the libel and the actual time of desertion under the proofs as submitted; *Cochran vs. Cochran*, 1 Westmoreland, 38; *Trotter vs. Trotter*, 47 Pitts. L. J., 109.

If we are allowed an amendment as to the time of the desertion named in the libel, it would not help the libellant if we are correct in holding that the departure to escape arrest

Murray vs. Murray

and imprisonment does not constitute wilful and malicious desertion.

The evidence shows that the relations of the wife with men other than her husband indicate that she was guilty of adultery.

The husband did not press this charge against his wife although made in the libel. He did not wish to bring disgrace upon others.

His purpose to save others from the consequence of their wrongdoing may be laudable, but it will not supply the defects in his proof of desertion on the part of the wife.

And now October 31, 1922, the report of the Master is referred back to him to hear any testimony that the libellant may offer to support the charge of adultery against his wife.

In the Court of Common Pleas of Montgomery County.

Murray vs. Murray.

Plaintiff filed his bill in equity against defendant, asking that the Court order defendants to transfer to him, the plaintiff, property which he claimed was transferred to the defendants upon consideration that they board and keep him for the remainder of his life without charge. The evidence as produced shows that the defendant, who was the son of the plaintiff, paid a fair price for the property, and that the only agreement made in reference to the board and lodging of the plaintiff was that if he, the plaintiff, would give him, the defendant, the furniture and other household goods, he would board and lodge him free. The plaintiff subsequently became dissatisfied and then removed from the premises, and now files his bill in equity to regain title to the property. Under the facts as produced the defendant took title to the property without any condition of the maintenance of the plaintiff, and the plaintiff's testimony does not support the contention that the transfer was made on the same consideration claimed, and since the defendant removed from the premises voluntarily, and since the only question involved in this suit is the real estate, therefore, the bill must be dismissed, because plaintiff has failed to prove his claim.

No. 10, June Term, 1922.

In Equity.

Hearing on Bill, Answer, Replication and Proofs.

Theo. Lane Bean, Attorney for Plaintiff.

H. I. Fox, Attorney for Defendant.

Opinion by Swartz, P. J., November 8th, 1922.

The plaintiff was the owner of a house and lot, situate in the Borough of Norristown, and of the furniture and household goods in said home.

Murray vs. Murray

He conveyed the said real estate to the defendants, and also sold the household goods to them.

He contends that as part consideration for the transfers he was to receive support and maintenance from the defendants during his lifetime. He claims that the defendants failed to carry out their agreement, and he therefore asks that they be directed to reconvey to him the house and lot, upon his paying back to them the cash he received.

The defendants answer that the deed made to them was an absolute conveyance in fee simple for a full consideration and without any condition annexed for the support of the plaintiff during his lifetime.

They admit that the household furniture was transferred to them upon the sole consideration that they maintain the plaintiff during his natural life.

It is admitted by both parties that the plaintiff removed from the said house and later took away all the said furniture.

FINDINGS OF FACTS.

1. The plaintiff is the father of the defendant John J. Murray and the father-in-law of Katharine A. Murray, the other defendant who is the wife of the said John J. Murray.

2. The plaintiff owned the house and lot No. 1302 Arch Street Road, in the borough of Norristown. It was subject to a building association mortgage for \$2400.00. He was a widower and almost seventy-three years old, in 1919.

3. He was without a housekeeper and in his advanced age found it difficult to keep up the building association dues from his earnings as a laborer. He concluded to sell or rent his house and lot.

4. He came to this country from Ireland when he was about thirty years old. He can neither read nor write. He was physically weakened from age, but there is no allegation in the bill that he was mentally weak or deficient. It is evident, however, from the testimony, that he did not have the mental vigor of his earlier years.

5. The son, John J. Murray, agreed to buy the property, if his wife, the said Katharine, would put her money into it

and join in the purchase. She agreed to do so. The plaintiff was to receive \$976 in cash and the defendants were to assume the payment of the building association mortgage. They agreed to pay to the father all the money he had put into the property. He had paid in cash \$400.00 when he bought the house and lot, and this sum, added to the money he had paid on the shares into the building association made up the aggregate sum of \$976.

6. By appointment the parties met at the office of an attorney. A deed was prepared under which the plaintiff conveyed the property to the said son and his wife, the other defendant. This deed was executed on October 27th, 1919, and the plaintiff received the \$976.00.

7. The parties then went to the office of the building association and the stock was transferred to the defendant. They returned to the office of the attorney and the son said the house would not serve him unless he had furniture to place into it. It was then that the agreement, recited as Exhibit "A" in the bill, was signed and sealed.

8. The plaintiff contends that the transfer of the real and personal property was made with the understanding that he was to receive in addition to the \$976.00, his maintenance for life from the defendants and without any charge by them. He also claimed that he was to have a reconveyance of the house and lot whenever he became dissatisfied and returned the \$976.

9. The defendants contend that the deed for the house and lot was an absolute conveyance to them in fee, without saying a word about any maintenance of the grantor. They swear that the subject of support was not mentioned or discussed, until after the deed was executed and delivered. They testify that their agreement to provide a home and board for the father was in consideration of the delivery to them of all the furniture in the said house, just as the agreement Exhibit "A" declares.

10. There is no evidence before us that the payment of \$976 in cash and the assumption of the building association mortgage was not a full and fair consideration for the house and lot.

Murray vs. Murray

11. We have no evidence as to the value of the furniture and household goods. The consideration may have been a full and fair sum for the home and board that the defendants were required to furnish under the contract.

12. As is usual under such agreements, difficulties and controversies arose. The plaintiff took away a box of tools, to give them to another son. The daughter-in-law objected but the plaintiff persisted and carried them off. Bad feeling was engendered and the parties refrained from speaking to each other. Finally the plaintiff withdrew from the house and later, with the permission of the defendants, removed all the furniture and household goods that he had sold to them.

13. The plaintiff stands alone in setting up a parole contemporaneous agreement, that the consideration for the conveyance was not fully mentioned in the deed and that he was to have his support and board for life in part consideration for the conveyance.

14. He does not allege that he was induced to sign the deed because of such alleged parole agreement. Nor does he say that he would not have signed the instrument, except for such inducement.

15. He is contradicted by the agreement he signed after the deed was executed. It declares that in consideration of the transfer to them of the household goods and from natural love and affection they will provide free of charge a home and board for Daniel Murry, for his natural life. He is also contradicted by the direct and positive testimony of the two defendants, who declare that no such contemporaneous agreement was made at the sale of the real estate.

16. He never made a sufficient tender, under his own version of the contract. He was to return the money received, that is, he was to place the defendants in the same position they held, when they took the title.

The dues in the building association accrued during a period of about three years. The defendants had to pay these dues to save the property. He was in duty bound to reimburse them for these payments, amounting to \$300.00 or more,

Murray vs. Murray

DISCUSSION.

just as much so as to return the \$976. He offered to pay back only the money they had paid to him.

Whether there was any parole agreement, that the plaintiff should have a free home and board for life, as part consideration for the conveyance of the house and lot is the only issue of fact before us.

There is no allegation of fraud or undue influence in the bill of complaint. Nor does he claim that the defendants took advantage of him or deceived him.

True, he says he cannot read or write, but it does not follow, that he failed to understand the language and purport of the deed when it was read to him.

"Where a conveyance is made by a parent to a child, the latter, in the absence of any allegation of fraud is not required to assume the burden of showing that the parent was fully acquainted with the character of the act in which he was engaged or that the conveyance was fair and conscionable;" Carney vs. Carney, 196 Pa., 34; Fiscus vs. Fiscus, 272 Pa., 326.

He says that he does not remember that he signed the deed. His efforts to obtain a reconveyance are inconsistent with such contention.

But the defendants are not called upon to meet or answer any charges except those that are made in the bill.

The plaintiff admits that he signed a paper, in the office of the attorney. If he has no recollection of signing the deed, then the paper that he executed was the transfer of the personal property. Under that agreement he was to receive a home and board for his natural life. If the household goods secured support for him, for the balance of his life, then there was no reason for fastening upon the deed a covenant that such support should be furnished as a part consideration for the conveyance.

Again, if he received full value for the house and lot, (and there is no testimony to the contrary) then there would be no consideration for an obligation to furnish for him a home and free board.

His evidence to impose a parole contemporaneous covenant

Murray vs. Murray

upon the deed, in addition to the consideration named therein, is flatly contradicted by two witnesses. The husband and wife now constitute two witnesses, in contradicting the plaintiff's parole evidence to establish a contemporaneous agreement that induced his execution of the deed; *Guersney vs. Froud*, 13 Pa. Superior Ct., 405. True, they are interested witnesses but they are corroborated by the contract set forth in Exhibit "A," and they are also corroborated by the circumstances surrounding the execution of the deed.

It will not do to graft covenants on a deed that materially affects the title by the evidence of the grantor alone, where he is contradicted by two witnesses, by the agreement, Exhibit "A," in evidence, and by the corroborating circumstances surrounding the case. No man's title would be safe, if it were so easy to destroy a written instrument, that has the solemnity, force and effect that must be given to a deed conveying real property.

Again, there is no evidence that the alleged contemporaneous agreement induced the plaintiff to execute the deed. "It is just as essential that it should appear that the party complaining relied upon the representation, and that but for it he would not have made the contract, as it is that the fact of misrepresentation be established; * * * "we must insist that the party shall not leave it to the jury to speculate and conjecture whether he was influenced by the representation to sign the paper made"; *Sulkin vs. Gilbert*, 218 Pa., 255.

A careful examination of the testimony fails to disclose any allegation that the alleged contemporaneous promise induced the plaintiff to execute the deed.

The evidence does not show that the plaintiff was denied the home and board to which he was entitled under the agreement found in Exhibit "A." At least, this question is fairly in doubt. When he removed the household goods the contract was terminated by mutual consent.

CONCLUSIONS OF LAW.

1. Under our findings of fact there is no sufficient evidence to establish a parole agreement at the time of the exe-

Murray vs. Murray

cution of the deed, that the defendants promised, as a part consideration for the conveyance, to provide free of charge a room and board for the plaintiff, during his natural life.

2. The written agreement made by the parties and set forth in Exhibit "A," shows that the delivery of the household goods constituted the consideration for such support and maintenance of the plaintiff.

3. The plaintiff is not entitled to a reconveyance of the real estate described in the bill. The defendants are the owners thereof in fee simple, without any obligation under the conveyance to furnish the plaintiff with a room and board free of charge.

4. When the plaintiff left the house on Arch Street road and removed the household goods the mutual obligations under the agreement found in Exhibit "A" were ended and determined.

5. The bill of complaint should be dismissed at the costs of the plaintiff.

And now November 8, 1922, after due consideration of the testimony and argument of counsel, it is ordered, adjudged and decreed, that the foregoing findings and conclusions be filed in the office of the Prothonotary who will enter a decree nisi and give notice forthwith to the parties or their counsel of such filing, and if no exceptions are filed as prescribed by the Equity Rules he will enter a final decree accordingly, as of course, that the bill is dismissed at the costs of the plaintiff.

In the Court of Common Pleas of Montgomery County.

In the matter of the rule granted on petition of citizens and residents of the Borough of Norristown and the Township of East Norriton, to show cause why they should not be allowed to intervene, as respondents, for the purpose of opposing the application of Norristown Passenger Railway Company for permission to surrender certain corporate powers.

Certain residents of the Borough of Norristown and of East Norriton Township petitioned the Court for a rule to show cause why they should not be allowed to intervene as residents for the purpose of opposing the petition of the Norristown Passenger Railway Company for permission to surrender its franchise. The Passenger Railway Company filed an answer to the rule, a part of which was in the nature of a demurrer, denying the petitioners right to intervene. In order to be allowed to intervene, the parties seeking such right must be such persons as are aggrieved by the decree of dissolution, and have no right of appeal therefrom, but the charter granted a corporation such as this, is a contract between the State, and authorizing it to perform certain duties, and in order to permit a person to intervene they must have some rights which would be directly affected by the decree, such a right does not exist in the citizens who are petitioning for a rule to intervene as residents, and therefore, the rule must be discharged.

No. 16, April Term, 1922.

Petition for right of certain parties to intervene.

Evans, High, Dettra & Swartz, Attorneys for Petitioners.

Larzelere, Wright & Larzelere, Attorneys for Norristown Passenger Railway Company.

Opinion by Miller, J., October 30th, 1922.

A small portion of the street railway system in Norristown consists of a single track line, or spur, laid in DeKalb street and extending northerly from Brown street for a distance of about 2200 feet to the line which divides Norristown from East Norriton township. Alleging the operation of this extension to have been for a long time unprofitable, Norristown Passenger Railway Company asks to be allowed to surrender its franchise thereon. The Burgess and Town Council of Norristown, desiring to be heard in opposition to the application being granted, asked to be allowed to intervene as respondent, and, by agreement of the company, the request was granted. The petition of the municipality indicates that it is acting both as the representative of its inhabitants and as a creditor of the company. That now before us shows that certain of such citizens and some of their neighbors from the adjoining township of East Norriton, all of whom are patrons

In re Norristown Pass. Ry. vs. Boro. Norristown et al.

of the branch trolley line involved, desire also to be heard as individuals in similar protest.

The act of April 9, 1856 (P. L., 293), on which the proceeding is based, in providing for an application to the Court of Common Pleas, must be understood as referring to the equity jurisdiction given to that court in the supervision of corporations by the act of 1836. The petition to surrender must, therefore, be regarded as a bill in equity, since the jurisdiction of the court is wholly in equity, and the proceedings must be held to conform to the practice in equity; *Titusville Oil Exchange's Dissolution*, 2 Pa. Sup. Ct., 508, 518.

The company filed an answer to the facts averred in the petition to intervene as individual respondents, but included therein a paragraph which, in effect, is a demurrer denying petitioners' right to do so. It was agreed by counsel on the return day, however, that this informality of pleading should be waived and the legal question raised by the demurrer should be first disposed of. We thereupon heard argument upon it.

The demurrer must be sustained for the reasons so clearly set forth in the recent similar case of *Easton Transit Company's Petition*, 270 Pa., 136, the decision in which was, however, expressly confined to the single question that individual protestants against such an application are not, under the statute, "persons * * * aggrieved" by a decree of dissolution and, therefore, have no right of appeal therefrom. As much that is to be found there applies with equal force here, we shall set it forth at length. Mr. Justice Simpson, who wrote the opinion, says in part: "The charter is a contract between the State and petitioner, authorizing and requiring the latter to perform certain public duties unless released therefrom by the State * * *; the individual citizens of the locality through which the railway passes, are not parties to the contract, and have no legal right to meddle in matters relating to its performance; and hence cannot, under any circumstances, compel petitioner to perform any of the duties thereby imposed upon it, * * *. Under the act of 1856, the only question to be determined by the Court below was whether

In re Norristown Pass. Ry. vs. Boro. Norristown et al.

'the prayer of such petition may be granted without prejudice to the public welfare or the interests of the corporators'.

"It necessarily follows from the foregoing, that, in the absence of special statutory authority so to do, no one has a right to appeal from the decree, unless he is authorized to act in matters relating to 'the public welfare,' or to 'the interests of the corporators', or has some personal right necessary to be specially protected, for instance, if an existing creditor, or a possible future one under an existing contract. Appellants do not belong to any of these classes, and there is no special statutory authority authorizing them to to appeal. It is true, they have an interest in the sense that an abandonment of this portion of the line will deprive them of one of the methods they previously used in traveling to and from their homes; but this is a difference in degree only and not in kind from that of the public generally; and because thereof we have consistently held it does not give to the individual citizen a standing to complain in such matters, even though he suffers a greater damage than any other citizen."

The same principle runs consistently through the long line of public nuisance cases. For a nuisance that is merely a public wrong only a public action can be brought and that must be done by the proper public functionaries. Interference with a common right does not of itself afford a cause of action by an individual. It is also to be found applied in many other cases, all of which deny generally to the citizen power to represent the public.

It is interesting to observe that, so far as known, the case now before us is of first impression in its own class so far as the question of intervention by individual respondents in the lower court, as distinguished from the right of appeal to a higher court, is concerned.

Here the right of such intervention appears to have been first squarely challenged. This fact becomes all the more interesting, because in many of the reported corporation dissolution cases, individual respondents have appeared in the lower court and been heard, but whether such was done by leave of court, by agreement, or without objection, because the right was mistakenly conceded, does not appear in the re-

In re Norristown Pass. Ry. vs. Boro. Norristown et al.

ports. Reference is made to New York & Penna. Railway's Petition, 47 Pa. C. C., 77; Easton Transit Company's Petition, 17 North. Co., 244; N. Y. & Pa. R. Co., appel., vs. The Public Service Commission, 72 Pa. Sup. Ct., 523, and our own case, Norristown Steam Heat Company's Dissolution, 36 M. L. R., 241.

But in New Castle Wire Nail Company's case, 18 Pa. Sup. Ct., 257, which was an unsuccessful effort to open a decree of dissolution, Judge Rice, who wrote the opinion, used the following significant language:

"But if the court in the exercise of its equitable powers to open decrees and judgments could restore the corporation to life after such a lapse of time, could it do so upon the petition of a private citizen, without the intervention of or even notice to the representative of the Commonwealth? This question, it seems to the writer, is not free from difficulty."

And it remains only to say that when the question is viewed in the light of the general principles that control the intervention of parties in equity, this difficulty will be removed and the conclusion already reached will again be arrived at.

The general doctrine that in equity all persons materially interested in the subject matter or the result of a suit are to be made parties to it, rests upon two principles: 1st, that the rights of no person shall be finally decided in a court of justice, unless he is present, or at least unless he has had a full opportunity to appear and vindicate his rights; and 2nd, that when a decision is made it shall provide for all the rights which different persons have in the matters decided and make the performance of the decree safe, and thus prevent a multiplicity of suits: Grant Township Water Co. vs. Pennypacker, 6 Dauphin Co., 89, 92.

Whether courts of equity should be liberal or strict in allowing intervention, it is certain, however, that one cannot be allowed to intervene who has no "rights" that would be directly affected by the decree. There should be some property right or interest prejudicially affected before one may intermeddle in the law suits of others: Andrews vs. N. Beth. W. G. Co., 268 Pa., 565, 568.

Wagenseller vs. Co-operative Association

A "right" has been defined to be a well-founded claim which means nothing more or less than a claim recognized or secured by law. Rights which pertain to persons, other than such as are termed "natural rights," are essentially the creations of municipal law, written or unwritten, and it must necessarily be held that a "right," in the legal sense, exists, when, in consequence of given facts, the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another: *Mellinger vs. City of Houston*, 68 Texas, 36; 3 S. W., 349, 251. Also, see *U. S. Fi. & Guar. Co. vs. Boro. Bank of Brooklyn*, 146 N. Y. Supp., 870, 876.

It is clear, therefore, that, however the question is viewed, the petitioners have no such rights in the matter as the law contemplates and requires to entitle them to be allowed to intervene as respondents to the petition to surrender.

The borough authorities, who, as already stated, have, by agreement, been allowed to intervene as respondents, will no doubt protect the interests of so many of the individual petitioners as may be inhabitants of it. So far as the rest are concerned, they live outside the borough limits in a township into which no part of the trolley line involved extends. Neither class, as such, has, under the law, as we feel compelled to construe it, any standing to be heard.

And now, 30th October, 1922, rule discharged.

In the Court of Common Pleas of Montgomery County.

Wagenseller vs. Norristown Co-Operative Association.

Plaintiff brought suit against defendant for balance on a book account. The defendant was a co-operative association, incorporated under the act of June 7, 1887, P. L. 365. The defendant filed his affidavit of defense under Section 20 of the Practice Act, setting forth that the act did not permit the extending of credit to a co-operative association, and as the matter alleged in the affidavit is new, and is in the nature of a demurrer, the same is not a proper defense, and defendant is given leave to file a supplemental affidavit of defense.

No. 106, April Term, 1922.

Sur Affidavit of defense filed under Section 20 of the Practice Act.

Elgin H. Lenhardt, Attorney for Plaintiff.

Darlington Hoopes, Attorney for Defendant.

Opinion by Miller, J., October 23, 1922.

The affidavit, which was filed under Section 20 of the Practice Act, asserts that the plaintiff's claim, which is based on a book-account, is uncollectible because the defendant debtor is a Pennsylvania co-operative association, chartered under the Act of June 7, 1887, P. L. 365, which, broadly stated, declares it to be unlawful to extend credit to such corporations. Unfortunately, the defendant has lost sight of the character of the affidavit which may be filed under Section 20 of the Act.

Such an affidavit is a substitute for a common law demurrer. It is still the law that matters of pure defense (excluding set-off and counterclaim) cannot be accepted as proven without a trial. "Under the Practice Act the defendant can raise any question of law arising out of the averments in the plaintiff's statement just as he could do formerly by demurrer * * *, but the question of law thus raised is the same kind that could formerly be raised by demurrer and must arise out of the facts averred in the plaintiff's statement and not out of new facts introduced by way of defense; in other words, it must not be what was called in common law pleading, a speaking demurrer, that is, one which alleges new matter, in addition to that contained in the narr, as a cause for demurrer. A demurrer is never founded on matter collateral to the pleading which it opposes, but arises on the face of the statement itself"; Boviard, appel., vs. Barrett & Son, 78 Pa. Sup. Ct., 68.

The affidavit now before us sets up facts, additional to those averred in the statement, and draws from them the conclusion that plaintiff is not entitled to recover. These facts, when established, may constitute a good defense, but, like any other matter of substantive defense, they must not only be averred in the affidavit, but proven at the trial.

And now, 23, October, 1922, after hearing, our decision is against the defendant, which is allowed fifteen days within which to file a supplemental affidavit of defense to the averments of fact of the statement.

In the Court of Common Pleas of Montgomery County.**Norristown Trust Company, Trustee, vs. Montgomery
Transit Company.**

The complainant filed its bill in equity against the defendant to foreclose on the mortgage made by the defendant to the complainant. The bill alleges default in payment of interest, whereby the entire principal became due, and asks that the property should be sold. Prior, however, to filing of this bill another proceeding in equity was started by certain holders of First and Refunding Mortgage bonds to have a receiver appointed, the same complainants in that proceeding now ask to intervene in the present proceeding to foreclose, and further that the decree of foreclosure be set aside, but if a decree of foreclosure be entered that they should not be precluded from their rights as to the proceeds of such sale. Answer to their petition was filed by the trustee and certain bondholders, setting forth that the holders of the First and Refunding Mortgage bonds held expressly subject to the first mortgage, and that any controversy as to the funds derived from the proceeds of sale would have to be decided upon distribution of said fund. The first prayer of the petitioners to intervene must be granted, but having intervened the averments of the answer to defeat the foreclosure proceedings based upon the allegations that the first mortgage did not cover all the property covered by the First and Refunding Mortgage, cannot be sustained, because the first mortgage has a clause in it which brings all property now owned or hereafter to be owned under the mortgage, so the property covered by the first mortgage is the same as that covered by the First and Refunding Mortgage. The decree for foreclosure must stand and the receivers appointed are also made parties defendant to the proceedings, and an application may be made to the Court to fix a day for the sale of said property under the terms of said decree.

No. 4, June Term, 1922.

Equity.

Petition to intervene.

Franklin L. Wright and Aaron S. Swartz, Jr., Attorneys for
Complainant.

Monroe H. Anders, Attorney for Defendant.

D. Yeakle Miller and Lewis Lawrence Smith, Esq., Attorneys
for Petitioners.

Opinion by Stuart, P. J., Third District, Specially Presiding,
November 8th, 1922.

On June 29th, 1922, the complainant filed a bill to foreclose a mortgage made by the defendant to the complainant, dated December 1st, 1911, to secure \$150,000.00 of defendant's bonds. The bill alleged default in the payment of interest whereby the entire principal became due, and prayed that the property covered by the mortgage should be sold. On the same day the defendant in its answer, signed by Alvin C. Alderfer, vice-president, and Daniel M. Anders, secretary, confessed the truth of the allegations contained in the bill, and on July 1st, 1922, the Court entered a decree directing that the property should be sold. Prior to these proceedings, to wit, on December 11th, 1921, a bill in equity between C. S.

Trust Company, Trustee, vs. Transit Company

Newhall, Otto Nowland and J. Rich Grier, plaintiffs, and Montgomery Transit Company, Norristown Trust Company and Liberty Title and Trust Company, defendants, had been filed in this Court, asking that the Montgomery Transit Company should be declared insolvent, and that a receiver should be appointed, and that the sale of the premises should be had under the decree of the Court. Answer and replication were filed, and testimony was taken in this latter proceeding, and on June 27th, 1922, the Court entered a decree that a receiver should be appointed. Subsequently the Court appointed the Penn Trust Company of Norristown, and J. Aubrey Anderson, Esq., receivers. On July 11th, 1922, the same complainants in No. 3, November Term, 1921, presented their petition to intervene in this case which alleges substantially the following matters: That they were the legal owners and holders of the first and Refunding bonds of the defendant of the par value of \$225,000.00, by virtue of an agreement that was received in evidence in the case No. 3, November Term, 1921, and that those bonds were secured by a mortgage dated December 1st, 1916, between the Montgomery Transit Company and the Norristown Trust Company, to secure the total issue, \$600,000.00, and that \$425,000.00 of that issue were outstanding; that the owners of \$150,000.00 First Mortgage bonds, above referred to, are Nicholas H. Larzelere, Daniel M. Anders, John F. Lederach and Alvin C. Alderfer; that on the date of the said mortgage said Larzelere was president and a director of said Transit Company, said Anders was secretary and treasurer and a director; said Lederach and Alderfer were directors; that in 1916 said Larzelere resigned as president and director, and the said Anders, Lederach and Alderfer are still directors; that by a written agreement, dated the 2d day of October, 1916, the said Larzelere, Lederach, Anders and Alderfer agreed to sell to W. R. Edelman and Company a majority of the capital stock and all the First Mortgage bonds of the defendant company; that in the spring of 1917 the said Edelman paid Larzelere et al. for 1602 shares of the stock at \$15.00 a share. They averred that payment for this stock was made out of the proceeds of the sale of the First and

Trust Company, Trustee, vs. Transit Company

Refunding Mortgage bonds. That by the terms of the First and Refunding Mortgage, the bonds issued under it were to be used for certain purposes, such as improvements and equipment of defendant's road, construction of extensions and retirement of the First Mortgage bonds; that the trustee delivered to said Anders and C. Merwyn Graham, who had been elected president and director to succeed Larzelere, the said bonds, who then delivered them to said W. R. Edelman, who negotiated the bonds and embezzled the proceeds, or a greater portion thereof, and that no part of the proceeds came into the hands of the Transit Company; that delivery of the said bonds was done with the knowledge of the directors, and also of the said Larzelere, and that the conduct of the said Anders, Lederach and Alderfer was grossly negligent, in violation of their duties as officers of defendant company, rendering them personally liable for any loss that might ensue; that the Norristown Trust Company was trustee under the First and Refunding Mortgage, and the pledgee of the First Mortgage bonds as collateral for a loan made to the said Larzelere, Anders, Lederach and Alderfer; that when the first interest on the First and Refunding Mortgage bonds fell due, a portion of the same was unpaid, and that subsequently the Norristown Trust Company certified \$220,000.00 of said bonds; that its positions above recited, are incompatible, and that it is improper that it should institute a proceeding on the First Mortgage; that the said Larzelere, Anders, Lederach and Alderfer have not the right to proceed to collect their bonds, but by reason of their conduct, their bonds should be postponed to the payment of the bonds secured by the First and Refunding Mortgage; that the First and Refunding Mortgage covers more property than the first mortgage; that under the prayer of the bill in No. 3, November Term, 1921 the Court should order the sale of the premises by a receiver; that the order of sale directed in the present proceeding, was prematurely made because the Norristown Trust Company, as trustee of the First and Refunding Mortgage, was not made a party thereto. Petitioners attach a form of their proposed answer, and pray the Court: (a) that they be permitted to intervene in this suit; (b) that the decree of foreclosure be

Trust Company, Trustee, vs. Transit Company

set aside; (e) that if a decree of foreclosure be entered, it should be done in such manner as not to preclude the application of the proceeds of such sale equitably among the parties entitled thereto; (d) general relief. After the hearing the same petitioners presented a supplemental petition for intervention in which they set forth that neither the Transit Company nor any of its officers filed a Certification of Notification with the Public Service Commission of the issue of the First and Refunding Mortgage bonds, and made no application for a Certificate of Valuation, and that it was the duty of the Transit Company to use the proceeds of said bonds for the purposes certified to the Commission, and for no other purpose whatsoever; that by the Public Service Act any violations of its provisions are made misdemeanors. The proposed answers of these petitions set forth substantially the same matters as are averred in the petitions. Answers were filed by the Norristown Trust Company and by N. H. Larzere on his own behalf, as well as on behalf of the other First Mortgage bondholders. The answer of the Trust Company set forth substantially: (1) The averments of the petition are not sufficient in law to justify intervention and to stay the sale ordered by the Court for the following reasons: (a) There is no allegation that the amount of the First Mortgage bonds is not due. (b) The First and Refunding Mortgage is made expressly subject to all the terms and conditions of the First Mortgage. (c) A sale under the Second Mortgage would not discharge the First Mortgage. (d) Any controversy as to equitable priority of bonds under Second Mortgage over bonds under First Mortgage must be adjudicated in distribution of proceeds of sale, and the Court is without jurisdiction in this collateral proceeding. (2) That it at all times, has been ready and willing to be relieved as trustee under the First and Refunding Mortgage. That petitioners never intimated a desire to foreclose the First and Refunding Mortgage; that the trustee never knew that there was any antagonism between the bondholders under the First and Second Mortgages; that it now tenders its request to be relieved from the trust under the Second Mortgage. (3) Your respondent expressly denies that it had any knowledge of any misuse or misappropriation

Trust Company, Trustee, vs. Transit Company

of the bonds secured under the Second Mortgage and delivered by it as trustee to the officers of the corporation pursuant to resolutions as provided for in the mortgage. The answer of N. H. Larzelere et al., sets forth substantially the following: That the petitioners do not deny the validity of the First Mortgage, nor that the interest thereon is due, nor that the trustee is not proceeding according to the terms of the mortgage, nor that the parties owning bonds are not lawful owners, nor that the Norristown Trust Company is not the equitable owner. Reserving the right to demur, for answer to the petition, it denies the amount of bonds claimed to be owned by petitioners. It admits the third, fourth, fifth, and sixth paragraphs. As to the seventh paragraph, it denies that the stock was paid for in the spring of 1917. It avers that most of it was paid before, and denies any knowledge of the source from which Edelman secured the money to pay for said stock. The eighth and ninth paragraphs are admitted. The tenth paragraph is denied, and it is averred that the bonds were rightly delivered by the president and treasurer under a contract between the Transit Company and the Philadelphia Construction Company. The eleventh and twelfth paragraphs are admitted. The thirteenth paragraph modifies the statements of the same paragraph of the petition. The fourteenth paragraph is admitted. The fifteenth paragraph is denied. The sixteenth paragraph avers that there is no conflict between the two mortgages. The seventeenth paragraph objects to making the proceeding in the bill for the appointment of a receiver a part of this case. The eighteenth paragraph is demurred to. The nineteenth paragraph is denied. The twentieth and twenty-first deny the legal allegations of the same paragraphs of the petition. The twenty-second paragraph sets forth the loss of the contract between the Transit Company and the Philadelphia Construction Company, and sets forth in full the course of dealing between the directors and Edelman. The conclusion is that the petition be dismissed. Testimony was taken by the Court, and upon the hearing we suggested that the proceedings in the case No. 3, November Term, 1921, be used in this case, and the petitioners formally offered the testimony, record and findings of the Court. Objection was made,

Trust Company, Trustee, vs. Transit Company

but we overruled the objection and granted the respondents an exception. We are entirely satisfied with that ruling, and see no reason to find further facts. The only matter to which attention should be called is that Mr. Yeakel, secretary and treasurer of the Norristown Trust Company, corrected his former testimony. Hence the eighteenth finding of Judge Swartz that states that no money was deposited by the Transit Company or any other party to meet the payment of the coupons as they matured, should be corrected by a finding that \$1277.50 was paid on the first of June, 1917, and \$1905.00 in December, 1917, for above purposes by a deposit to the credit of Montgomery Transit Company by checks on Philadelphia, but it was not shown who drew the checks. The first prayer of the petitioners to intervene must be granted; it was so ruled in Northampton Trust Co., Trustee, vs. Northampton Traction Co. et al., 270 Pa., 199; if for no other purpose than to allow petitioners to appeal. We discussed the whole subject of intervention at length in an opinion in above case, reported in 17 Northampton Co. Reporter, 315, and referred to the different rules prevailing in the Federal Courts, as shown by the cases cited, but we feel that our Supreme Court has declared that leave to intervene should be freely granted. We shall also follow the above case in treating the proposed answers as having been actually filed, and will consider the testimony as bearing on the matters set up in them. As was succinctly stated by the learned counsel for petitioners in their brief: "The essential question remains whether, having intervened, the averments of the proposed answer are adequate to defeat or postpone the foreclosure of the *first mortgage*." In their brief they suggest that the record is not in proper shape because the Norristown Trust Company "and perhaps the trustees under the mortgage of the Montgomery Transit and Light Company should have been joined." From no point of view is the latter company interested in the present matter. The evidence shows that it was a mere holding company created by Edelman. In cases where the sale is made by a receiver, such as the sale in the Northampton Traction Company case, it is necessary to make trustees of all the mortgages parties to the suit in order to divest the liens, and from the

Trust Company, Trustee, vs. Transit Company

opinion of Mr. Justice Green in *Fidelity Title & Trust Co. vs. Schenley Park & Highlands Ry. Co.*, 189 Pa., 363, it appears that the same practice applies to a foreclosure of corporation mortgages by bill. See especially pages 370 and 371 of opinion. In *Grand Trunk Ry. Co. vs. Central Vt. Railroad Co.*, 88 Federal Rep., 622, it was held: "The granting of leave to intervene makes it unnecessary to make the trustee in the second mortgage a party to the suit." The same principal is laid down in *Farmers' Loan & Trust Co. vs. Northern Pacific Railroad Co.*, Federal Rep., 423. On principal these decisions would seem to be sound. Parties being permitted to intervene, and representing a class of bondholders, in most instances, as in the present case, a majority, notice to them should be sufficient, but in the present case the petitioners do not claim to represent all the outstanding First and Refunding Mortgage bonds, nor do they set forth in their pleadings that they desire to intervene on behalf of themselves and others. Both the original bill and the present petitions confine their averments to the petitioners' own interests. The Norristown Trust Company has always expressed a willingness to resign as trustee under the First and Refunding Mortgage, and has made it a part of its answer as follows: "It now tenders its request to be relieved from the trust under the Second Mortgage." The eighth article of the First and Refunding Mortgage sets forth the duties of the trustee, and the third, fourth and fifth sections contain full provisions as to the method to be followed in cases of resignation of trustee and the appointment of a successor. They should be followed. The next objection is that the Norristown Trust Company is an improper complainant. No authority was cited in support of that contention, and no reason was stated that commends itself to us, either in the brief or on the argument. It was the trustee in the First Mortgage, and the amount of the First Mortgage is unquestionably due and owing. It is entirely proper that it should be collected, and it can make absolutely no difference to anyone whether it collects the amount for its own benefit or for the benefit of the first mortgage bondholders. The active duties which the authorities cited refer to, are to collect the money and to make distribution of

Trust Company, Trustee, vs. Transit Company

the proceeds. The trustee under the First Mortgage represents the bondholders under that mortgage, and no authority has been cited that would extend the duties of the trustee under the First Mortgage to include protection for the bondholders of any subsequent mortgage so long as they were acting in a lawful way. The relations alleged to exist between the owners of the bonds and the Norristown Trust Company and the holders of the bonds of the First and Refunding Mortgage are not to be determined in a proceeding to collect the First Mortgage. Whether these matters are to be determined upon distribution of the proceeds, or whether the petitioners must proceed in a direct proceeding against the Trust Company or against individuals, we do not decide. Another objection was that the answer of the Montgomery Transit Company was not sanctioned by the directors of that company, and that the answer should be stricken off. In former times it was held that a corporation could not express its will or enter into a contract except by an instrument under seal. In modern times the ancient rule has been almost wholly discarded. Corporations can act without a seal and without the sanction of the Board of Directors. In the present case the power was signed by the vice-president and the secretary, who would be more likely to know of the insolvency of the company than the principal officers thereof. In the present case, having simply put on record what the petitioners themselves admit, that the money was due and owing under the First Mortgage, the answer is entirely sufficient. It is also objected that the receivers must be made parties. The receivers have been appointed, but have not qualified. They have not asked leave to intervene in this suit. It has been held that: "The appointment of receivers of railroad company, pending statutory proceedings in another court against the company for the assessment of construction damages, does not interfere with the prosecution thereof, nor is the plaintiff therein bound to bring in the receivers. It is their business to intervene, and make defense, if they wish to do so." *Mercantile Trust Co. vs. Pittsburgh & Western Railroad Co.*, 29 Federal Rep., 732. In *Willink vs. The Morris Canal & Banking Co. et al.*, 4 N. J. Equity Rep., 377, it was held: "Where the receivers were ap-

pointed after a *pro confesso* had been taken against the corporation, by which the right of the complainant to recover was established. *Held*, that the receivers were not necessary parties, and that an objection made by a third party to the bill for want of proper parties on that ground, would not be sustained. If the receivers should ask to be substituted as defendants, with the view of setting up a defence, the Court would permit them to do so at any stage of the proceedings." That a creditor can use the means provided by law, despite the objection of a receiver, has been held in *Pairpoint Mfg. Co. et al. vs. Watch Co. et al.*, 161 Pa., 17, and *Lowry, Trustee, vs. Phila. Optical & Watch Co.*, 161 Pa., 123, and *Blum Bros. vs. Girard Nat. Bank et al.*, 248 Pa., 148. As the trustee under the Second Mortgage is to be made a party, it might be better practice to make the receivers parties, although it is not essential. The next reason is that a sale under the First Mortgage will not wholly discharge the lien of the Second Mortgage. If the facts were as contended, this ought not to necessarily delay the collection of the First Mortgage bonds. While it is true that this proceeding to foreclose a mortgage is in equity, and is governed by equitable rules, nevertheless it must be borne in mind that the main duty of the Court is to aid any complainant in the collection of its debt if it is justly due. Our duty in this matter is so fully set out in the case of *Philadelphia Trust Co., Trustee, vs. Northumberland Co. Traction Co. et al.*, 258 Pa., 152, and *Columbia & Montour Electric Co. vs. North Branch Transit Co.*, 258 Pa., 447, that it is unnecessary to more than cite those cases. Nor is there anything in the objection that is founded upon matters of fact. We have carefully compared the two mortgages. The description of the several pieces of real estate described in each mortgage is precisely the same. When it comes to the general clause, the first mortgage, on page 68 of the bill, reads as follows: "All the property, buildings, and all other property, real, personal or mixed, now owned by the said Montgomery Transit Company." The First and Refunding Mortgage has precisely the same language, and adds this: "and which may hereafter be acquired by the said Montgomery Transit Sompany." This mortgage then has this clause: "SUBJECT, however, to a mortgage or deed of trust made and delivered to the trustees named so far as the said mortgage

Trust Company, Trustee, vs. Transit Company

covers the property hereby mortgaged, conveyed or pledged or any part thereof to the Norristown Trust Company of Norristown, Pennsylvania, securing an issue of bonds amounting to One hundred and fifty thousand dollars, due December 1st, 1931, and known as first mortgage bonds." The First Mortgage has this clause: "Third: That the said railway company shall and will, from time to time, execute other and further assurances, confirmations, assignments and transfers to the said trustee for the securing of the principal and interest of the bonds aforesaid as counsel for said trustee shall, from time to time, advise or require, so as to confirm and assure unto the said trustee all rights and all property, real, personal and mixed, which has already been acquired or which may hereafter be acquired by said railway company, and to have the same vest and insure to the use, benefit and security of the holders of the bonds with the like effect as if the complete legal title thereto in the said railway company had already become vested in them at the time this mortgage was executed." That clause was the foundation for Exhibit B, found on page 81 of the bill, wherein the Montgomery Transit Company undertook to transfer certain things to the Norristown Trust Company so as to include them under the terms of the First Mortgage. Whether distinct pieces of property, either real or personal, acquired after the date of the first mortgage, if there had been any such, would pass under the proposed sale, or whether the First and Refunding Mortgage would have a first lien on them, is a question we need not discuss. There is no testimony to show that there is any such after acquired property. While the fifth paragraph of the bill is somewhat ambiguous in its expressions, a mere pleading cannot change the facts. A mere substitution of new articles for old ones has never been considered as after acquired property. The testimony fails to show affirmatively that the First and Refunding Mortgage has a superior lien over the First Mortgage as to anything now owned by the defendant company. Even if that condition existed, there would be no occasion for any confusion in the conduct of the sale, and provision could easily be made to protect the First and Refunding Mortgage bondholders. The final con-

Trust Company, Trustee, vs. Transit Company

tention of the petitioners is that the negligent conduct of the trustee and the four First Mortgage bondholders is such that the sale under the First Mortgage should be restrained, or if allowed, that the First and Refunding Mortgage bondholders should be preferred in payment out of proceeds. That as we understand it, is the substance of their prayer (c), and their contention in the brief. It is admitted by everybody that the First Mortgage bondholders are holders for value. They are four parties. Three of these parties are directors of the Transit Company. Mr. Larzelere, it is admitted, had no connection with the Transit Company as an officer or director or stockholder since the fall of 1916. He was connected with the Norristown Trust Company as director and as counsel. It nowhere appears that he had anything to do personally with either the issuing of the bonds or their certification, nor that he was under any obligation to see to the application of the proceeds. He, together with the other directors, sold their bonds and stock to Edelman. An opportunity was also afforded to other stockholders to sell to Edelman, and a large number of the stockholders availed themselves of Edelman's offer, and received cash for their stock. It was said that that money was paid out of a portion of the First and Refunding Mortgage bonds, but the testimony does not disclose where Edelman got his money. When he had acquired possession of the company, he proposed to improve the road in a manner that, as we take it, was quite usual in the promotion of trolley roads. The period of his proposed operation was just prior to our entering into the World War. His delay in building would, under all the circumstances, have appeared to be prudent. The only fact that differentiates this transaction from many others was that Edelman was a thief and embezzled the proceeds of the First and Refunding Mortgage bonds. Surely Larzelere and the other three directors are not in the same category. Suppose that there had been five bondholders, one admittedly entirely disconnected with any of these proceedings, could a Court in Equity exclude him from its grasp, and lay hold of the other four? Assuredly not. What is to be the measure of the penalty that is sought to be imposed on these parties? The holders of the

Trust Company, Trustee, vs. Transit Company

First and Refunding Mortgage bonds presumably purchased them for value, and that presumption extends to their face value, but if they had purchased them for ten cents on the dollar, while they might be entitled to collect their face value in a foreclosure procedure, would it be equitable to penalize the four bondholders by requiring them to pay the full amount of their First Mortgage bond holdings to the holders of the Second Mortgage bonds, and if not the full amount, what would be the measure of damages? Suppose that Edelman had carried out one of the provisions of his contract by paying off and retiring the entire issue of the First Mortgage bonds. Necessarily these four parties would have dropped out, and the First and Refunding Mortgage bondholders would have gotten the benefit of the security now held by the First Mortgage, but if Edelman had embezzled the proceeds of the other bonds, and petitioners' position is a correct one, the holders of the First and Refunding Mortgage bonds would still have a right of action against the four parties. In other words, it must be perfectly clear that this alleged right of action is separate and distinct from the foreclosure of the First Mortgage. The fact that they are the sole owners of the First Mortgage bonds is merely accidental, and cannot be connected either at law or in equity with the alleged right of action against them as directors. Whether the matter can be brought up on a question of distribution or whether a bill in equity would lie, or whether the receivers should bring suit, is not now before us. We do not think it proper to discuss at length the alleged negligence of the directors or of the Norristown Trust Company. The subject matter of the supplemental petition need not be discussed. The preparation of the mortgage and the legal proceedings connected therewith were not in Mr. Larzelere's hands, although he examined the mortgage after Mr. Graham had prepared it. As stated in the brief, the only bearing the failure to conform to the Public Service Act would have on this case is on the question of negligence. All that we decide at the present time is that the decree of July 1st, 1922, will not be vacated.

And now, November 8th, 1922, this cause came on to be heard upon petition and answer thereto, and upon considera-

In re County Bridge at Norristown

tion of the testimony taken and after argument, it is ordered, adjudged and decreed that the petitioners are permitted to intervene in above suit, and the answers to their petitions are filed and made a part of the record. Application to set aside the decree of foreclosure and judgment entered July 1st, 1922, and other relief prayed for, is denied, and after the substitution of trustee under the First and Refunding Mortgage is made, and the new trustee and the receivers are made parties to this cause, an application may be made to the Court to fix a day for the public sale of the property of the defendant under the terms of said decree, or as the same may hereafter be modified.

***In the Court of Quarter Sessions of the Peace in and for
the County of Montgomery.***

In re County Bridge between Norristown and Bridgeport.

The proceedings under the Act of February 14, 1907, P. L. 3, for the erection of a bridge at DeKalb street over the Schuylkill River, the matter came in due time to the Court for its approval or disapproval. The approval of the same having been withheld until such time as the Court was informed as to whether the bridge could be repaired, and having received proper information that the bridge could be put in proper condition to take care of travel until such time as grade crossings can be eliminated, under the circumstances, therefore, the Court must disapprove of the present plans for a new bridge, in that it is insufficient to take care of traffic.

Petition for a bridge.

Freas Styer and Charles D. McAvoy, Attorneys for County Commissioners.

Opinion by Swartz, P. J., and Miller, J., December 4, 1922.

This proceeding was instituted under the Act of February 14, 1907, P. L. 3. The said Act provides that the bridge to be constructed shall be a new and sufficient bridge to accommodate the public travel.

We considered the application with great care and gave our reasons why it was held in abeyance.

For the reasons then given in our opinion we concluded that our approval or disapproval of the application should not be entered until we had more definite information as to the actual condition of the existing structure over the river.

In re County Bridge of Norristown

We suggested that "a thorough and impartial examination and investigation of the condition of the old bridge be made; that the cost of strengthening it, if the same is feasible, should be estimated."

We said that the citizens in the community who are directly interested in the construction of a new bridge, might find it advisable to aid the Court in obtaining the desired information. We suggested that the Commissioners might see their way to help us in like manner.

Our former opinion clearly sets out the matters upon which we sought information to guide us in our future action.

We desired to know whether the old bridge by repairs could be made reasonably safe for public travel for a few years or whether it is so decayed and weakened that it is beyond repair.

We needed no information that the bridge was old and that the time had arrived when a new structure should take its place. This was self evident from the testimony before us.

If the construction of a new bridge could be stripped of the surrounding conditions that are inseparably connected with its erection, the problem before us would be very simple. Of course we need a new and sufficient bridge. There is no dissenting voice upon that proposition.

We need not repeat the facts and reasons set out in our former opinion, upon which we based our findings and conclusions, "that a new and sufficient bridge at the location in question involves as a feature thereof, the simultaneous elimination, at least, of the two Norristown railroad grade crossings." We found that the two improvements "constitute one inter-related, inseparable and comprehensive scheme."

If we are correct in this view, then there should be no construction of the new and sufficient bridge until all reasonable efforts are exhausted to bring about the simultaneous elimination of the grade crossings. The abolition of these crossings is a difficult and expensive proposition. How long the construction of the new bridge should await the solution of this problem we need not now determine.

We found that a controlling factor for any delay depended upon the fact, whether the old bridge by repairs

In re County Bridge of Norristown

could be made reasonably safe for public travel during such delay.

That we are correct, that the two improvements must go hand in hand, if possible, is established beyond controversy. Two grand juries so declared. It is quite evident that the second grand jury based its approval of the bridge upon certain plans submitted to it, showing how the grade crossings could be eliminated by a low level bank to bank bridge construction. This grand jury also received assurances that negotiations were pending with the railroad corporations for the elimination of the existing grade crossings.

That the second grand jury did not intend, that the bridge should be built unless the grade crossings were abolished, is evidenced by their added recommendation,—“that the county commissioners, before placing the contract for the erection of said bridge, obtain legal assurances from the Pennsylvania Railroad Company and the Philadelphia and Reading Railway Company, to change the grade of their tracks over DeKalb street, so as to eliminate their present grade crossings in Bridgeport and Norristown.”

The testimony taken before the Court at the public hearing, on October 10, 1922, was to the same effect. The witnesses were unanimous in declaring that a new bridge without an elimination at least of the Norristown grade crossings would not, in their opinion, constitute a sufficient bridge. Nearly all the time of said hearing was taken up by demonstrating that the low level bank to bank bridge proposed by the County Commissioners would be sufficient because, under the plans submitted, DeKalb street would be depressed so that the railroads would cross the street by overhead bridges.

The County Commissioners by their laudable efforts and negotiations with the railroad companies, during the past three years, to reach an agreement whereby the grade crossings could be eliminated before the plans for the new bridge were perfected, give no uncertain voice that in their opinion elimination of the grade crossings and the construction of the new and sufficient bridge should be carried on hand in hand.

Any impartial witness who takes a view of these grade

crossings, observes the constant delay and danger to public travel, along DeKalb street, notes the near location of the bridge and the topography of the surrounding grounds, will surely reach the same conclusion.

But it is contended that the delay in constructing the bridge as proposed is unnecessary, that its erection will not interfere with future elimination of the grade crossings. We cannot assent to this proposition. There are so many factors and interests involved in abolishing the grade crossings, that no one can, at this time, determine the methods that may be finally adopted. It is very desirable that all the parties in interest should come to an agreement and determine how the improvements should be made, and how the costs and expenses should be apportioned. No doubt the Public Service Commission would approve any reasonable solution of the problem agreed upon by all the parties in interest.

If an agreement cannot be reached, then it follows that the Public Service Commission must act, if the dangerous grade crossings are to be eliminated. It may need an impartial arbitrator, like the Public Service Commission, with its large powers, to determine how the grade crossings shall be removed and how the expense involved shall be apportioned.

The Public Service Commission has the exclusive power to abolish grade crossings according to plans and specifications it shall approve: Act of July 26, 1913, P. L. 1375, Article V, Sect. 13.

If we are correct in finding that the two improvements are so interlocked that the one must affect the other, it follows that the construction of the low level bridge from bank to bank, as proposed, will abridge and limit the future method of removing the grade crossings. The Public Service Commission might be seriously embarrassed by the level of the new structure, at the river bank, so close to the grade crossings. Suppose the County Commissioners had constructed a low level bridge at Conshohocken, before the method of abolishing the grade crossings had been adopted; such construction would have formed a serious barrier to the methods finally adopted when the crossings were abolished.

We deemed it necessary to repeat so much of our former opinion, in order that our purpose in asking for further in-

In re County Bridge of Norristown

formation as to the true condition of the old bridge might be clearly understood. It will also appear from this repetition of our views, that much of the valuable information contained in the reports of the expert engineers submitted to us, is not relevant to the inquiry we proposed.

The sole subject upon which we sought additional light was the actual condition of the old bridge. Could it be repaired so as to provide reasonable safety for the public travel for a few years? The public must have the use of the old bridge pending the necessary delay to formulate the method of abolishing the grade crossings. If repairs to the old bridge are not feasible, then any further delay in approving the pending application could not be justified. Although the new bridge, as already demonstrated, would not be a sufficient bridge without the elimination of the grade crossings, yet it would probably be the best that the Court could do under the unfortunate existing circumstances.

No doubt our approval, at this time, of the pending application would mean a continuance for years of the existing death traps, the serious delay and obstruction to public travel and interference with access to the new bridge.

We appreciate the efforts and services of the public-spirited citizens and also of the County Commissioners in securing for us the reports of skilled engineers as to the actual condition of the old bridge.

The three reports agree that the old bridge is not beyond repair; that it can be made reasonably safe for public travel for some years. Two of the experts gave us their estimate as to the probable cost of such repairs. Mr. Hudson states that the expense would probably amount to \$40,000. Mr. Miller's figures are \$10,000. Mr. Priest names no amount but states how the repairs should be made. Mr. Hudson declares, "that in spite of the age of this structure a considerable part of it is in a very fair physical condition." The upper and lower bracing of the bridge, he states, is in a very fair condition. The principal weakness of the structure, pointed out by Mr. Hudson, relates to the ribs or arches where they rest upon the piers or abutments. The heels of the arches in many cases, he states, are decayed.

The Miller report is not as elaborate as that submitted by Mr. Hudson. However, it shows a careful examination of the various members or parts of the structure. This report also calls attention to the heels of the arches. The condition of each is classified. "A" means bad, "B" poor, "C" fair and "D" good. He finds that the heels of the two inner arches, throughout the bridge, numbering sixteen, are "good," and with the trusses now form the main support of the bridge and the carrying of travel. Fourteen of the outer heels he marks "A" or bad, and two are marked "C" or fair. His report and drafts also show the parts of the bridge that should be repaired, and where and how the work of repairs should be made. The Hudson report and drafts are to the same effect. The latter engineer also finds that the bridge is seriously out of repair as to the flooring of the roadway, over the bridge. He states, "The oak wearing floor for the driveways is, however, in a very bad condition and is so rough and uneven as in my judgment to produce impact stresses fully as large as those produced by applied loads."

We saw the contract and agreement the county made with the trolley company. The use of the bridge by the railway was granted upon condition, that the latter "Keep in good order and repair the flooring of the roadways of the said bridge."

Why the flooring was allowed to fall into the serious condition of disrepair found by the engineer is difficult to understand.

Mr. Hudson after considering the necessary repairs, including the renewing of the roadway floor to provide for public travel for a few years, concludes that the "cost including the flooring would be in the neighborhood of \$40,000." In his opinion, "the Commissioners should proceed with the construction of a new bridge at this location" and adds, "that if the bridge were in the best possible physical condition it would be altogether inadequate for present day traffic."

There is no fixed money standard to measure the amount that may be expended in repairs to safeguard life and limb.

To Mr. Hudson's conclusions, as an abstract proposition, we can all give our assent. The bridge is old and in its de-

In re County Bridge of Norristown

sign and accommodation is inadequate for present day traffic. But this is not the problem before us. We should prefer to have his opinion, whether the new bridge should be built at once, under the actual existing conditions and difficulties standing in the way of a new and sufficient bridge. He bases his opinion, in large part, upon the needs of a bridge to meet present day traffic. If the whole situation, as presented to us, were to be submitted to him, we have no doubt that he would agree with the experts heard on September 10, 1922, that no new and sufficient bridge can be constructed, as long as the railroad grade crossings continue in their present locations; and that the construction of the new and sufficient bridge should be delayed until a scheme to remove these crossings is formulated, if such elimination is reasonably probable within a few years and the old bridge can be strengthened to meet the needs of public travel in the meanwhile.

As already stated, some parts of the reports of the engineers are not responsive to our inquiry. This is true especially of the Hudson report.

But the information contained therein is of the highest importance and value to those who have the supervision of the old bridge. Some of the timbers are decayed and the bridge cannot bear the strain of former days. The care given by the County Commissioners to safeguard the public is commendable and is not open to criticism.

Now that they have full information as to the actual condition of the bridge and its weak parts are pointed out, the utmost care and supervision must be exercised, so that the weak parts of the bridge may not be subjected to any unnecessary weight or strain. Competent watchmen must continue to guard the public and enforce the rules made for the safety of public travel. Vigilance must be exercised by those in charge of the bridge. The reports, however, do not show that there is any immediate danger to public travel, if a proper distribution of the imposed loads is observed and enforced.

If we are correct in making an order that may delay the construction of a sufficient bridge, then the duty to repair the old bridge at once, is imperative.

The expense attending the repair of the bridge during

the necessary delay is not prohibitive when we consider the importance of a new and sufficient bridge over the river at DeKalb street.

The travel over this bridge is so extensive that no other bridge in the county is worthy of a comparison. Why the county seat should submit to a bridge construction under a continuance of these intolerable grade crossings is incomprehensible when other towns along the river have been relieved from these dangers and interferences with public travel. As long as there is a reasonable hope of eliminating the grade crossings within a few years, no new bridge should be built to embarrass the construction of this grade crossing improvement so absolutely necessary.

The construction of grade crossings, under the decisions of the Supreme Court, cannot be tolerated unless an "imperious" necessity is shown for their existence.

If the parties cannot agree upon a scheme to eliminate these grade crossings, or if the Public Service Commission upon a careful investigation decides that these intolerable nuisances must continue, the time may then be at hand to build a bridge that will not meet the public needs. This question can and should be brought to a final solution within a year or two.

It will not do to say that the county can not afford to incur the expense of making the repairs suggested by the expert engineers. Ten thousand dollars, or even more, is not a prohibitive sum when the public interests are involved in securing improvements of inestimable value.

But the cost of the repairs is a secondary consideration. The duty to repair the bridge during any delay that may follow, is imperative, as we pointed out in our opinion; *Commonwealth vs. Bird*, 253 Pa., 364. The Commissioners cannot evade this duty under their official obligations.

But it is argued by counsel for the Commissioners, that we are placing an undue burden upon that body, because it has no authority or power to eliminate the grade crossings. This is true in part, but it is also true that the County Commissioners can take steps, as they have already done, to bring about an abolition of these grade crossings. Where a bridge

In re County Bridge of Norristown

is to be erected over a stream and the existing roadway is not adapted for the construction of a proper bridge, the County Commissioners endeavor to obtain a shifting of the route of the old roadway so as to enable them to build a suitable bridge. A somewhat similar duty confronts the County Commissioners in the case before us.

We have already pointed out that the proceeding to build this bridge could have been instituted under the Act of May 8, 1909, P. L., 494. Under that Act as in the case of the Bethlehem bridge, and othed cases to which we referred, approaches, even if extended over railroad grade crossings, become a part of the bridge and the Public Service Commission of necessity would have to intervene to approve or adopt the method of eliminating the grade crossings.

If the Commissioners are convinced, that a low level bank to bank bridge is the proper construction, then there is no difficulty in calling upon the Public Service Commission to intervene and determine how the grade crossings shall be eliminated, if the Public Service Commission approves of the low level bridge scheme to avoid the existing grade crossings.

Any interested party can petition the Public Service Commission to intervene. Who is more interested in calling upon that body than the County Commissioners, if the scheme to abolish the grade crossings can not be amicably arranged by all parties interested? The County Commissioners through the importunities of the public, are the real movers in the application now before the Court.

We might hesitate in yielding to the universal demand that the new bridge be constructed in connection with the elimination of the grade crossings, were we not convinced that the time is fully ripe when these grade crossings must be abolished. If any grade crossings have outlived the right to a further existence, our crossings belong to that class. De-Kalb Street is a main thoroughfare. The use of these crossings by railroad trains has multiplied very rapidly. Years ago the Norristown Branch was operated between Philadelphia and Norristown, its terminus. Later the Reading Railway Company constructed a bridge over the river above Norristown. The Company then diverted nearly all its passenger

In re County Bridge of Norristown

travel from the Main line to the Norristown branch. Trains from remote parts of the state now pass through Norristown over the grade crossing. Day and night, passenger and freight trains obstruct public travel along DeKalb street.

The Schuylkill Valley railroad ran between Philadelphia and Norristown. Later this line was extended through the Schuylkill and Lehigh coal fields. It is now a through line for passenger and freight trains over the DeKalb street crossing. If a vehicle is not tied up at the one crossing it is pretty sure to be obstructed at the other.

We have said but little that relates to the grade crossings in Bridgeport. We do not mean to suggest how these crossings or any of them should be eliminated. That is a matter for the parties specially interested in the subject, including the County Commissioners and the Public Service Commission.

We can not see our way to approve the application before us for the reasons assigned, and we do not wish to approve the construction of a bridge that may block the proper method whereby these crossings should be abolished.

What order should we enter? We might hold the application in further abeyance, because this grade crossing problem must be solved one way or the other in a year or two, even if the Public Service Commission is called in to determine whether the crossings shall be removed or continued for an indefinite period.

To hold the application may not be proper. Counsel for the County Commissioners argue that we are in error in withholding our approval. We must give them an opportunity to review our conclusions by an appeal to the higher Court. This can not be done until we enter a final decree.

We must therefore follow our convictions and conclusions and refuse an approval of the application.

Even if no appeal is taken no serious delay will follow. When the time is ripe for a new proceeding to construct a bridge to take the place of the old one, the grant and approval can be entered in a very short time.

One of two conditions must follow, first,—the grade crossing question must be decided in the near future for or

against the elimination, or secondly,—the delay in such settlement may be too long to postpone the construction of a new bridge, even if such construction fails to meet the public needs.

If the County Commissioners, when the time is ripe, renew their application under the Act of 1907, or proceed under the Act of 1909, it will require but a single term of Court to perfect their right and authority to build a new bridge.

And now December 4, 1922, after due consideration and a careful review of all the facts and the law pertaining to them we enter our disapproval of the application to build a bridge over the Schuylkill river, at DeKalb street, between Norristown and Bridgeport as the same is fully described in the application and drafts before us.

In the Court of Common Pleas of Montgomery County.

Hiriam H. Hirsch, trading National Chemical Products Co.

vs.

H. H. Burdan and C. C. Burdan trading as Burdan Brothers

Plaintiff sued defendants for recovery of damages for breach of alleged contract to sell them goods over the value of Five hundred dollars. Plaintiff telephoned defendant ordering certain goods and asking for confirmation of the order by letter. Both parties accordingly wrote letters to the other, setting forth certain facts as the basis of their understanding, but the allegations of the plaintiff are at variance with their proof. At the trial, on motion of the defendant, a verdict was rendered in favor of the defendant, from which action the plaintiff moved for a new trial. On the facts produced there seems to have been no agreement in writing such as would conform to the Sales Act, therefore, a motion for a new trial must be overruled and judgment be entered in favor of the defendants.

No. 142, September Term, 1919.

Sur Plaintiff's motion for a new trial.

Larzelere, Wright & Larzelere, Attorneys for Plaintiff.

Henry D. Saylor, Attorney for Defendant.

Opinion by Miller, J.

The plaintiff sued for the recovery of damages arising out of an alleged breach by the defendants of a parol contract to sell him goods exceeding \$500 in value and, at the trial, upon the written request of the defendants, the jury were instructed to render a verdict in their favor. This is the only error assigned by the plaintiff in support of his motion

Hirsch vs. Burdan

for a new trial, which raises the three questions for our consideration which are hereinafter discussed. There was no acceptance or receipt by the plaintiff of part of the goods or the giving by him of something in earnest to bind the contract, or in part payment.

The contract sued on is set forth in the amended statement of claim as follows: "On or about July 7, 1919, C. C. Burdan, one of the defendants, verbally agreed with the plaintiff to furnish him with 5000 cases of sweetened condensed milk for August shipment at \$7.125 per case, these prices based on the July prices of milk, provided that should the price of whole milk for August be higher, the price to be relatively higher, F. O. B. New York for export, or F. A. S. New York."

To establish this contract the plaintiff testified that he called Mr. Burdan on the telephone on July 7, 1919, and asked him for a quotation on condensed milk, to be shipped to New York for export, "the same as we had previously purchased from him, and he gave me a price of \$7.125 on 5000 cases for August delivery and stated he might give us 3000 more if he possibly could during the same month of August at \$7.15." The plaintiff testified further that he thereupon placed the order with the defendants under these conditions and, as he no doubt knew of its infirmity in the law, that he requested Mr. Burdan to confirm the contract by letter the same evening.

Defendants' letter of the same day, reads as follows:

"Confirming our telephone conversation of this afternoon, we will furnish you with 5000 case of sweetened condensed milk for August shipment at \$7.125 per case, net.

We will make every effort to furnish 3000 cases more at \$7.15. These prices are F. O. B. New York, but do not include your brokerage which will have to be added to the above. These prices are also based on the July price of milk and should the price of whole milk for August be higher, the price of condensed milk will be relatively higher."

The alleged parol contract was, of course, made unen-

Hirsch vs. Burdan

forceable by action by the first paragraph of Section 4 of the Sales Act of May 19, 1915, P. L. 543, unless some note or memorandum in writing of the contract or sale was signed by the parties to be charged or their agent in that behalf.

The "party to be charged" means, in this connection, the defendant in the action. *Gano, Moore & Co., Inc., vs. Bertner Coal Co.*, 48 Penna. C. C., 163; *Wexelblatt, app., vs. Katman & Greenberg*, 75 Pa. Sup. Ct., 219.

1. The only contract in the case is the one alleged to have been made over the telephone and its terms are to be found set forth in the statement. The testimony of the plaintiff departs from them in several material respects. The alleged contract was for "sweetened condensed milk," while the plaintiff testifies that it was for "condensed milk, the same as we had previously purchased from him." There is nothing in the record to the effect that the plaintiff had theretofore purchased "sweetened condensed milk" of the defendants. The plant of the latter was in Pottstown, Pa. Shipment was to have been made to New York. The contract declared on says the milk was for August shipment. The plaintiff testifies it was for August delivery. He says nothing about the important feature, that the price of \$7.125 per case was subject to advance if whole milk cost more in August than it did in July, but he does testify concerning a possible increase by 3000 cases in the quantity of milk involved at an added cost of 2½ cents per case, although the contract declared on makes no mention of it. And, lastly, while the contract included, as one of its terms, that the milk was sold "F. O. B. New York, or F. A. S. New York," which imposed certain liabilities on the defendants, the plaintiff testified that it was merely "to be shipped to New York for export," which imposed none. The *allegata* and *probata*, therefore, did not agree.

2. The letter of the defendants, dated July 7, 1919, is, on its face, also at variance with the terms of the contract as declared on in at least two, apparently, material respects. It declares that the price per case for the 5000 cases was to be not \$7.125, as set forth in the statement, but \$7.125 per case, net, not including plaintiff's brokerage, "which will have to be added to the above," and it states that this price is

Hirsch vs. Burdan

"F. O. B. New York" and not "F. O. B. New York for export, or F. A. S. New York."

We observe in passing that all three, the statement, plaintiff's testimony and defendants' letter, omit any mention of a very important factor, the time and method of payment. Oral testimony is, of course, admissible to explain the meaning of technical terms such as "F. O. B." and "F. A. S." where such terms are used in a written contract, but when so admitted, it makes no change in the contract of the parties, but merely throws light on its meaning. But when reliance on such testimony must be depended on to supply proof of the terms themselves, as is the case here, then the whole is reduced to parol and becomes unenforceable. The note or memorandum in writing that is required by the act is not of "a" contract but of "the" contract which the plaintiff seeks to enforce. It is essential that in all its terms it be definite and certain. The note or memorandum must evidence that fact. If there is lack of consistency between them; if, after comparing them, there remains doubt and uncertainty as to which is the real contract of the parties; then the purpose of the act is defeated, because dependence must be had on oral testimony either to supply omissions in the writing, or to reconcile it with the parol contract. In either alternative there is the danger at least of failure of recollection if not of open perjury and this provision of the act was incorporated in it in order to remove the possibility of fraudulent practices in sales of personalty of substantial value. This thought is illustrated by the testimony in this case on the question, not of the meaning of the terms "F. O. B." and "F. A. S.," which was admissible (*Moore, app., vs. Eisaman*, 261 Pa., 190), but of the difference between supplying condensed milk for export and for home consumption, which affects its method of packing, marking, lighterage in New York Harbor, drawbacks, and other features.

All of the essentials of the agreement must appear in the writing to be signed by the party to be charged. * * * If not complete in itself and oral evidence be required to supply omissions, then the whole is reduced to parol. * * * Such evidence cannot be used to supply proof of the terms

Hirsch vs. Burdan

of the contract itself. *Manufacturers L. & H. Co., app., vs. Lamp et al.*, 269 Pa., 517,526; *Shaw et al., Exrs., app., vs. Cornman et ux.*, 271 Pa., 260, 262; *Moore, app., vs. Eisaman*, *supra*.

Defendants' letter of July 7, 1919, was not, in our opinion, a note or memorandum in writing of *the* contract which plaintiff seeks to enforce. They are substantially inconsistent.

3. The plaintiff, in his effort to recover, is embarrassed by a further difficulty. It must always be borne in mind that the only contract in the case was alleged to have been actually made on the telephone on the afternoon of July 7, 1919. We have already directed attention to the inconsistencies between its terms, as set forth in the statement, and as they appear in the plaintiff's testimony at the trial. The plaintiff testified that "I told him (H. H. Burdan) to confirm it (the contract) the same evening, which he did, and I also confirmed it the same evening." Their letters crossed in the mails. We have also just considered that of the defendants and noted carefully just where it departs from the contract declared on. The plaintiff wrote:

"We confirm having purchased from you today:

5000 cases condensed milk at \$7.12½ pr case.

3000 " or if you can increase same to 5000 cases in August, at \$7.15 pr case.

Terms—F. A. S. New York, packed for export. Net cash against documents. Quality guaranteed to meet with United States Government requirements.

Shipment—In August as per shipping instructions. Please present all papers through the Corn Exchange National Bank, Phila., where drafts will be paid promptly."

It is thus readily to be seen that the plaintiff then set up a contract substantially different in its terms from any yet mentioned. His confirmation shows a "purchase" as distinguished from an "order" to be accepted, or a mere "quotation of price"; a definite commitment for 8000 cases, instead of 5000; for condensed milk, not sweetened condensed milk; under "terms", that the goods were to be shipped "F. A. S.

Hirsch vs. Burdan

New York, packed for export. Net cash against documents. Quality guaranteed to meet with United States Government requirements;" something entirely new in the case; and under "shipment," something equally new. In other words,—the two so-called confirmations are not only inconsistent with the contract declared on, but with each other. Furthermore, that of the defendants, by the use of the expression "we will furnish" indicates, that no contract had been yet entered into, but that they merely offered to do something in the future, which, to have become binding, must have been accepted in terms. *Clements vs. Bolster et al.*, 6 Pa. Sup. Ct., 411. It was not an admission that a contract had been made. *Mason-Heflin Coal Co., app., vs. Currie*, 270 Pa., 221, 224.

That of the plaintiff shows an actual purchase of 8000 cases. To have contracted at all, both parties must have assented to the same thing in the same sense and their minds must have met as to all the terms, which had been, in all respects, definitely understood and agreed on. They were, according to the plaintiff's claim, contracting presently and it seems that the confirmations were intended only as convenient written memorials or records of their understanding. Incidentally, within the true meaning of the word, they would have served the further purpose of a compliance with the Sales act. Unfortunately, however, they clearly demonstrate that the minds of the parties had never met,—that no contract between them existed. This, as already shown, is especially true of the plaintiff's letter. See *Hutchinson Baking Co., app., vs. Marvel*, 270 Pa., 378, 380.

For these reasons, we are not convinced of error in directing the jury to find for the defendants. The motion for a new trial is, therefore, overruled, the reason is dismissed and the prothonotary is directed to enter judgment in favor of the defendants on the verdict upon payment of the verdict fee.

In the Court of Common Pleas of Montgomery County.

Yocum vs. Griffith.

Plaintiff filed his bill in equity against defendant, alleging that he was one-half owner in a bungalow of defendant's and asked for an accounting. The testimony showed that defendant paid for all labor and material which entered into the bungalow with the exception of some old lumber from a bungalow of plaintiff's, which was hauled to place of the new bungalow. The answer of defendant was an absolute denial of plaintiff's allegations and was responsive in every respect, and the testimony of the plaintiff did not overcome that of defendant in that there was no declaration on part of defendant that plaintiff was one-half owner. Therefore bill must be dismissed.

No. 3, June Term, 1922.

Equity, Hearing on bill, Answer and replication.

F. Kenneth Moore, Attorney for Plaintiff.

C. H. Stinson, Attorney for Defendant.

Opinion by Swartz, P. J., November 2, 1922.

The defendant erected a boat house or bungalow along the Schuylkill river front near the foot of Barbadoes Street, in the borough of Norristown. The plaintiff contributed lumber for the building from an old boat house in West Conshohocken, and also contributed labor in constructing the new boat house. He claims to be a joint owner in the new structure.

The defendant answers that he is the sole owner of the building, and that the plaintiff's contributions to the building were made as a gift.

FINDINGS OF FACT.

(1) The plaintiff is the son-in-law of the defendant. He owned a boat house located on ground belonging to James Hall in West Conshohocken, about four miles from Norristown. He was notified to remove the building, within thirty days. The structure was built about thirteen years ago.

(2) The defendant, Elbridge Griffith, is a widower. He decided to build for himself a house or bungalow, along the Schuylkill river front.

(3) The plaintiff proposed that the West Conshohocken boat house be torn down and that the old lumber be used in constructing the new building. The old building was torn down and the defendant paid the cost of removing the materials to Norristown. The expenses of hauling were \$35.00.

Yocum vs. Griffith

(4) Some of the old material was not worth the cost of hauling; other parts were fit for use in the new building and were so applied.

The joists and rafters of the old structure entered into the new. From the evidence we find that the old material used was worth less than \$100.00. From this sum the cost of hauling must be deducted.

(5) The plaintiff was not a carpenter, but was a handy man with tools. He worked at the new building. He was employed, in the day time, at Conshohocken, and all that he did in erecting the new house was done in the evenings, on rainy days or Sundays. The defendant was also working at the structure. His son Robert helped him without any charge. A carpenter, Mr. McCoy, was paid \$37.20. Mr. Bateman did work for which he was paid \$32.65. A Mr. Proctor did mason work for which he charged \$20. Mr. Jones also worked at the building. These men were all paid by the defendant. He also paid for the services of the electrician and for steam couplings.

The plaintiff did not contribute any money for the work done by others on the building, but he did considerable work at the house, more than any other single workman.

(6) The defendant purchased and paid for the new materials that entered into the construction. He paid for lumber, to Mr. Kneas \$157.00, and to the Grater-Bodey Company \$125. He paid for hardware, paint, roofing paper and glass \$100; for lime and sand \$10; also for stone, but the amount is not given.

(7) The boat house or bungalow was constructed on land owned by Mr. Schlichter. The \$30 a year lease was made to the defendant. He produced a receipt that he had paid to the landlord up to this time \$95.00 for rent.

(8) One of the disinterested witnesses called by the plaintiff declares that the new building, as it stands, is not worth more than \$600.00.

The actual cash paid out by the defendant in erecting the house is about \$517.00. If to this sum there is added the cost of the electrical work, stone used and other expenses, it

Yocum vs. Griffith

would appear that the defendant has expended an amount nearly equal to the value of the structure.

(9) The plaintiff paid nothing for new materials that entered into the house. It is true that Mr. Garber says he thinks he may have paid a small glass bill. The plaintiff contends that he gave his wife a Liberty bond of \$50.00, to use part thereof in buying lumber for the building. The evidence shows that the wife offered to her father, the defendant, the sum of \$5.00, but he declined to receive it.

(10) The plaintiff contends that there was a verbal agreement, that he was to be a half owner of the building if he contributed the materials from his boat house and assisted in the construction of the new bungalow.

(11) The defendant denies that any such agreement was made. He claims that his son-in-law offered to make him a present of the old building, if he would tear it down and pay the expense of hauling it to Norristown. He says the son-in-law had orders to remove the old building, had no use for it, and out of kindness volunteered to help his father-in-law to acquire a new home; that his assistance in building the new structure was bestowed from the same motive.

(12) The defendant's claim is corroborated by his son, **Robert**. The surrounding circumstances also favor his contention. No witness was called who at any time heard the father or the son-in-law make any statement that the new house was to be owned by them jointly.

It is strange that with all the workmen assisting in the construction of the building, and the friendly relations then existing between the parties, that no mention of this joint ownership should be made, if it really subsisted.

(13) If the plaintiff was a half owner of the building he never asserted his rights, while he and his wife occupied the house. He went so far as to tell his wife that he would not submit to the use of his bedroom, in the day time, by the defendant's grandchildren, and that she should inform her father to that effect.

(14) He never made any direct objection that the defendant was giving the use of the house to others, without

Yocum vs. Griffith

first asking the plaintiff's consent, nor did he at any time order these occupiers to quit the premises.

He left without saying a word to the defendant, that he had violated the alleged agreement, which provided, as he declared, that the house should belong to them in equal shares, and that he, his wife and the defendant were to be the sole occupants of the building.

(15) He left the house and his wife remained, and still remains in the building with her father.

(15) The defendant paid the rent for the use of the ground, paid the coal bills, and all other fixed expenses incurred by the occupancy of dwelling. The plaintiff made no contribution whatever toward the same.

DISCUSSION.

The controversy, under the bill, answer and proofs, raises the sole issue, whether there was a verbal agreement, that the plaintiff should have a half interest in the boat house if he contributed to the new construction the lumber in his old building, and erected or assisted in erecting the new structure.

The answer is a full, direct and complete denial, that any such contract was made. It is a responsive answer.

It is true that the rule in equity, that a responsive answer must be overcome by the testimony of two witnesses or one witness with corroborating circumstances equivalent to the testimony of another witness, was abolished by the Act of May 28, 1913, P. L. 358.

It is, however, still the law, that the complainant in equity, like any other plaintiff, must establish the essential averments in his bill by a preponderance of the evidence. This he has failed to do, as our findings of facts clearly show.

The defendant denies the existence of any agreement that the plaintiff was to have a part interest in the constructed boat house. He swears that all that the plaintiff furnished was a gratuity to his father-in-law. He is corroborated by another witness, his son, Robert.

The corroborating circumstances are also against the plaintiff's contention. That the plaintiff, who contributed in materials and labor, so small a part of the value of the new

Yocum vs. Griffith

boat house, should receive from his father-in-law, who is a widower and eighty-four year old, a half interest in the building, is an unreasonable and improbable story.

The workmen at the building were asked, if at any time, they heard any statement made by either of the parties that the construction of the building was a joint venture; they answered that nothing whatever to that effect was mentioned by either.

The wife apparently lived in amicable relations with her husband while the building was in progress of construction, and while they occupied part of the boat house. Naturally she would be interested in a house and home that was owned, in part, by her husband. She knew nothing about the alleged agreement made in favor of her husband, otherwise he would have called her as a witness in his behalf. On the contrary, she was ready to testify against him, but was excluded on the ground that she was the wife of the plaintiff and could not testify against him.

The plaintiff left the house in August, 1921, and did not file his bill until June 22, 1922. He left without any interview with his father-in-law and without any efforts to assert his right to exclude from the premises all occupants who had no rights there. His complaint consisted of the use of his bed in the day time by the grandchildren while he was away at work.

If he was the half owner of the house it was his duty to pay half the rent and expenses of maintaining the building, at least during the time he and his wife occupied the boat house. He made no contribution toward the rent for the ground and made no offer to pay any part of it.

It is true that the plaintiff lived in the building for about four months without being asked to pay any rent to the defendant. This is explained by the father-in-law who says the plaintiff had to move and had no home to go to, and that he invited the plaintiff to occupy a room in the new building. This was natural, because of the help that the plaintiff had given in providing a house for the aged parent of his wife.

It is contended that it is unreasonable that the plaintiff would contribute the old lumber and his labor in construct-

ing the house without any compensation. We must remember, however, that the assistance was given his aged father-in-law. The lumber supplied was of little value to the plaintiff, because he had to remove the old building. The labor was furnished during the hours that he was not engaged at his regular employment. He lost no time and expended no money in the assistance he rendered while working at the building.

If he is entitled to compensation, it does not follow that he acquired any interest in the boat house itself. If he has a good claim for materials and labor furnished he must collect it in the usual way. The evidence, however, shows that he declared that it would not cost his father-in-law one cent for any labor the plaintiff performed in the erection of the boat house.

It is not necessary to consider the question of jurisdiction in equity. Both parties ask that the Court shall take jurisdiction and dispose of the case. Where no question of jurisdiction is raised, on a bill for an accounting, the Court will not dismiss the case after the parties have submitted their evidence and completed their argument; *Seabright vs. Carlisle Deposit Bank*, 126 Pa., 504.

CONCLUSIONS.

From our findings of facts it follows:

1. That the plaintiff is not entitled to an accounting as prayed for, because he has no interest or part ownership in the new boat house.
2. That the plaintiff is not entitled to demand a sale of the property or to share in the proceeds of any sale of the same.
3. That the plaintiff should pay the costs of the proceedings.

And now, November 2nd, 1922, after careful consideration of the evidence and arguments of counsel, it is ordered, adjudged and decreed that the foregoing findings and conclusions be filed in the office of the prothonotary who will enter a decree nisi and give notice forthwith of such filing to the

Wallace and Warner vs. Robinson

parties or their counsel, and if no exceptions are filed as required by the Equity Rules, he will enter a final decree accordingly, of course, that the bill is dismissed at the cost of the plaintiff.

In the Court of Common Pleas of Montgomery County.

**Brenton G. Wallace and Frederick G. Warner, co-partners,
trading as Wallace and Warner, vs. John L. Robinson,
owner or reputed owner.**

A mechanic's lien was filed against defendant's property and a writ of scire facias was issued on the lien. Whereupon defendant filed his motion for a rule to quash the writ in that the scire facias issued did not follow the Act of Assembly as amended by Act of May 23, 1913, P. L. 307, in that the return day fixed in the writ is in conflict with the return day prescribed by the Act.

There was no repeal in the Amended Act of the Act giving the Court the right to fix the return days, nor is there any notice of an intention to repeal such Act in the title of the amendment, therefore the rule to quash must be discharged.

No. 100, June Term, 1922.

Mechanics' Lien.

Motion to Quash Writ of Scire Facias.

Elgin H. Lenhardt, Attorney for Plaintiff.

I. P. Knipe, Attorney for Defendant.

Opinion by Swartz, P. J., Oct. 23, 1922.

The defendant's application to quash the writ assigns as the reason for the motion,—that the scire facias issued does not follow the form and substance of the Act of Assembly approved July 9, 1901, P. L. 431, as amended by the Act of May 23, 1913, P. L. 307.

No defects in the writ are pointed out in application to quash.

At the argument it was contended that the return day fixed in the writ is in conflict with the return day prescribed by the said Act of 1913.

The writ was issued on the 15th day of July, 1922, and was made returnable on the second Monday of September next, being September 11, 1922. This was the first return day, under the rules of court, for a writ issued in July, 1922.

It was also the first Monday of the regular September term of court.

Our five terms of court begin on the second Monday of the months of February, April, June, September and November.

Under our rules the first Monday of each term of court is a return day for writs.

On May 29, 1902, the following rule was adopted: "In addition to the return days now established by law, the second Monday of each of the months of January, March, May, October and December is made a return day for all writs issued for the commencement of actions; for all writs of scire facias to revive judgments and continue the lien thereof; for all other writs of scire facias; and for writs and process of every kind; and the party suing out the same may, at his election, make such writs returnable on any of the said return days." This rule was made under the authority conferred by the Act of June 11, 1879, P. L. 125.

Section 30 of the Act of June 13, 1836, P. L. 572, provided for the return of writs to the first day of the term succeeding the time at which they should be issued.

The amending Act of May 23, 1913, P. L. 307, declares that the proceedings to recover the amount of any claim, as aforesaid, shall be by writ of scire facias, in the following form, namely:

To the Sheriff of Said County,

Greeting:

Whereas.....has filed a claim in the Court of Common Pleas..... for the county of..... against.....for the sum of..... for (work done or materials furnished, or both as the case may be) to (or on) a certain structure or other improvement, to wit: (describing the property as in the claim);

And Whereas it is alleged that the said sum still remains due and unpaid to the said

Now we command you that you make known to the saidthat.....be and appear before the Judges of our said Court to be held at..... on the first Monday of next to show, if any-

Wallace and Warner vs. Robinson

thing..... Know or have to say why the said sum of..... should not be levied of said property to the use of the said.....according to the form, decree, and effect of the Act of Assembly in such case made and provided, if to them it shall seem expedient." Then follows an order that the party shall be notified that if he has any defense he must file an affidavit in the prothonotary's office within fifteen days after the return of the writ, otherwise judgment will be entered against him for the whole amount of the claim. A reading of this section shows that there is no intent on the part of the legislature to fix any definite time for the return of writs of scire facias. The blanks indicate that the return day is to follow the existing rules in the respective counties of the Commonwealth.

Our rule followed the acts of Assembly authorizing the courts to fix return days for writs. When the rule adopted, as in our case, follows the language of the statute, it should have the same force and effect as the statute itself. We can not assume that there was an intent, in giving the form aforesaid, to repeal the provisions of the existing statute or of the rules of court made to conform to them, fixing the return day of writs. If such repeal were intended, this section should declare "that the form of the writ and the return day thereof shall be as follows:"

A change in the form of the writ of scire facias was first declared under the Act of April 17, 1905, P. L. 172. The title to the act stated that its purpose was to amend the Act of 1901, by changing the form of the claim and the writ of scire facias thereon. There is no reference to any return day nor to fixing the time for the return of the writ. Again the return day on the writ constitutes no part of the "*form*" of the writ.

The framer of the Act of 1913 had in mind the information that the writ should give to the owner, so far as the amount of the claim was concerned, and the steps he must take if he would contest the claim. In drawing the act there was no intent to interfere with any established return days for the writ of scire facias. That, he intended to leave in

blank. He may have assumed that the first Monday of the month was the return day under the existing rules of court throughout the various counties. He fell into error. It was no more than a clerical error that was not material to the purpose or intent of the enactment.

The blank even as it stands could be filled in to meet our return days. If we inserted the words "of the September term" it would then read "the first Monday of the September term next." Or if the party issuing such writ desired to select an intermediate return day he could specify in the blank a certain day of the month. To illustrate, a writ issued in September and returnable the second Monday in October, would then read, "the first Monday of October after October 2nd next." While this would be an unusual designation of the return day, still it shows that the framer of the Act did not mean to fix the return day in such specific words as to exclude the application of our rules of court.

Our rules of court are too strongly entrenched under the acts of Assembly to entertain this motion based upon an objection that has no substantial merit.

We may add, so far as the case before us is concerned, the return day specified in the writ is in complete harmony with blanks found in the act of Assembly. A return "on September 11, 1922," is only another way of saying "on the first Monday of the September term next." Our September term began on September 11, 1922.

And now, October 23, 1922, the rule to quash the writ is discharged.

In the Court of Common Pleas of Montgomery County.**Kastle vs. Balthaser.****Balthaser vs. Kastle.**

A and B were going in opposite directions on the same highway, both on the right side of the road, when A approached a road which ended in the highway upon which both were traveling. He bore to the left, thus traveling diagonally, and crossed the path of B's car. As a consequence a collision occurred. A brought suit against B and B brought suit against A. The verdict of the jury was in favor of B in both cases. A moves for a new trial, alleging that the charge to the jury as to what constituted an intersection of public highway was not in conformity with the motor vehicle act. The act does not make any particular provision as to the direction of the operation of motor vehicles where a road ends in another road and does not cross the road, and to construe such a case as not being in the intersection of roads would be too narrow a construction of the act and would not be in conformity with the decisions of the higher Court. Therefore the motion for a new trial must be overruled.

Nos. 16 and 121, February Term, 1922.

Motions and reasons for a new trial.

Henry M. Brownback, Attorney for Kastle.

Evans, High, Dettra & Swartz, Attorneys for Balthaser.

Opinion by Miller, J., December 21, 1922.

A collision between the automobiles of the parties resulted in injury to both cars. Each owner sued the other for damages and the cases were tried together. The verdicts were for defendant in Kastle vs. Balthaser and for plaintiff in Balthaser vs. Kastle, and Mr. Kastle has moved for a new trial in both cases.

Schwenksville road enters the Ridge turnpike, or Penn Highway, from the north almost at right angles and ends in and does not cross it. Mr. Kastle was driving his car in an easterly direction on the Penn Highway and Mr. Balthaser was doing the same with his, but in an opposite direction. Each was on his right hand side of the road.

As Mr. Kastle approached Schwenksville road, he bore to his left for the purpose of entering it for a short distance and then backing out, intending to turn around and return whence he came. As he thus traveled diagonally and crossed the path of Mr. Balthaser's car, the two automobiles collided in the northerly portion of the bed of the turnpike directly opposite Schwenksville road.

The only feature of the trial of which Mr. Kastle now complains is that the trial judge instructed the jury that the

junction of these two roads constitutes an intersection of public highways within the meaning of the Motor Vehicle Act of June 30, 1919, P. L. 678; thereby imposing upon him the statutory duty of passing to the right of the intersection of their center lines before turning to the left—a thing which, admittedly, he had failed to do. At no time before the collision had any portion of his car, except possibly the right front wheel, crossed the extended center line of Schwenksville road. The question involved is, of course, not what may be an intersection, as a matter of fact, or in popular understanding, but what is such of public highways, under a proper construction, and within the meaning, of the Act of 1919. It is with the latter phase of it only that we have presently to deal.

This question has already been given some, but most casual, consideration in our own case of *Cox vs. Wells et al.*, 37 M. L. R., 64, and received careful thought in the more recent case of *Shainline vs. Stefko*, 37 *ibid.*, 299. There one road ended in, but did not cross, the other, and it was held, for the reasons which need not be repeated here, set forth at length in the opinion, refusing a new trial, that such a condition constituted an intersection of public highways under the Motor Vehicle Act.

A few days after the latter case was decided, the Superior Court handed down its opinion in *Taylor vs. Bland*, *appel.*, 77 Pa. Sup. Ct., 551, which not only sustains this construction, but, apparently, goes somewhat farther. In that case, in which there was a recovery by plaintiff, the defendant had driven her automobile out a private lane and turned to her left into the public highway without passing to the right of the point formed by the intersection of the extended middle line of the lane and that of the public highway. The trial judge charged the jury: "In doing so she did not follow the provisions of the law for motor vehicles and if, by reason of her failure so to do, she caused the accident, she would be liable; provided it occurred without any negligence of the plaintiff also causing and contributing thereto."

In its opinion refusing a new trial the lower court afterwards said: "The court applied the rule applicable to highways to the acts of the defendant and said that as she came out of the intersecting road upon the left and turned to the

Kastle vs. Balthaser

left instead of proceeding across the highway and keeping to the right of the intersecting point she would be liable, providing her so doing caused the accident, unless the plaintiff was guilty of contributory negligence." The judgment was affirmed, but it is to be observed that the distinction between a private lane and a public highway, as defined by the Act of 1919, seems to have passed unnoticed by both the lower and the appellate court.

The case of Springfield Road, 73 Pa., 127, while not in point and, therefore, not decisive of the question now before us, is, nevertheless, in harmony with our conclusion. It is authority for the principle that, under the road laws, the point of intersection of two roads, as laid out and marked on the ground by the viewers, is not the place where the middle line of one crosses the side line of the other, but is the point where their middle, or center, lines intersect. In that case one of the roads ended in and did not cross the other.

The Act of 1919 clearly indicates, in both its title and text, that it was intended by the legislature to be a general and comprehensive law "relating to, and regulating the use and operation of, motor vehicles" in Pennsylvania. It, with its amendment of 1921, now constitutes the last expression by that body on the subject. Many prior acts have been passed and subsequent experience had suggested their improvement. So far as we can see, every safeguard that could be thought of was intended to be provided,—every contingency that could arise in the use of the public highways by such vehicles has been anticipated. If the construction of the fifth paragraph of the 25th section, for which counsel for Mr. Kastle now contends, should be allowed to prevail, then, strange to say and as pointed out in *Shainline vs. Stefko*, supra, the Act lays down no rules that apply particularly to the frequent use by motor vehicles of the junction of two highways, where one ends in, and does not cross, the other.

Notwithstanding the ever-present danger of such use, the Act is absolutely silent on the subject. We cannot adopt such a narrow construction of the law,—one which would permit a driver to cut corners to his left against the course of travel,—and, for the reasons set forth herein and in *Shain-*

Kastle vs. Balthaser

line vs. Stefko, *supra*, again hold that the junction of two public highways, where one ends in, but does not cross, the other, is an intersection of them within the meaning of the fifth paragraph of the 25th section of the Motor Vehicle Act. See, generally, Huddy on Automobiles, 6th Edition, Sections 27 and 259, and Berry Automobiles, 3d Edition, Section 276.

And now, 21st December, 1922, both motions are overruled, the reasons are dismissed, a new trial is refused, and the prothonotary is ordered to enter judgments on the verdicts upon payment of the verdict fees.

INDEX

ACTS OF ASSEMBLY CITED

| | Page |
|--|-------------------------|
| 1777, Jan. 28, 1 Sm. L. 429, Fines and Recognizances..... | 27 |
| 1779, Apr. 3, Sm. L. 470, Sec. 2, Replevin..... | 156 |
| 1836, June 13, P. L. 572, Sec. 30, Actions Personal..... | 362 |
| 1836, June 13, P. L. 589, Lunatics and Drunkards | 44 |
| 1856, Apr. 9, P. L. 293, Corporations | 322 |
| 1860, Mar. 31, P. L. 427, Criminal Procedure | 116, 157 |
| 1860, Mar. 31, P. L. 382, Crimes | 119, 207 |
| 1871, June 19, P. L. 1360, Corporations | 89 |
| 1879, June 11, P. L. 125, Return Days | 362 |
| 1887, May 23, P. L. 158, Desertion and Support | 42 |
| 1887, June 7, P. L. 365, Co-operating Associations..... | 326 |
| 1893, June 8, P. L. 345, Actions Personal | 61 |
| 1895, June 25, P. L. 300, Lunatics and Drunkards | 44 |
| 1895, June 25, P. L. 308, Divorce | 42 |
| 1899, April. 28, P. L. 84, Mandamus | 61 |
| 1901, June 4, P. L. 431, Mechanics' Lien | 166, 168, 276, 286, 361 |
| 1901, June 19, P. L. 574, Wills..... | 44 |
| 1901, July 9, P. L. 614, Actions Personal | 279 |
| 1903, Mar. 19, P. L. 32, Mandamus..... | 61 |
| 1905, Apr. 14, P. L. 152, Criminal Procedure..... | 116 |
| 1905, Apr. 17, P. L. 172, Mechanics' Lien | 363 |
| 1905, Apr. 18, P. L. 211, Divorce | 43 |
| 1905, Apr. 22, P. L. 260, Counties and Townships..... | 126 |
| 1907, Feb. 4, P. L. 3, Roads, Highways and Bridges.... | 291, 339 |
| 1907, May 28, P. L. 292, Lunatics and Drunkards | 43, 45 |
| 1907, June 8, P. L. 440, Equity | 128 |
| 1909, Mar. 24, P. L. 65, Mechanics' Liens | 277 |
| 1909, May 8, P. L. 494, Roads, Highways and Bridges.... | 295, 347 |
| 1911, May 18, P. L. 309, Common Schools..... | 163 |
| 1913, May 23, P. L. 307, Mechanics' Liens | 361 |
| 1913, May 28, P. L. 358, Evidence | 358 |
| 1913, June 19, P. L. 526, Mandamus | 61 |
| 1913, July 26, P. L. 1374, Public Service Corp.... | 88, 123, 240, 343 |
| 1915, Apr. 21, P. L. 154, Divorce | 42 |
| 1915, May 14, P. L. 373, Borough Code | 88-91 |
| 1915, May 14, P. L. 483, Practice Act | 47 |
| 1915, May 19, P. L. 543, Sec. 4, Sales Act | 100, 351 |
| 1917, Apr. 5, P. L. 42, Mechanics' Lien | 279 |
| 1917, May 18, P. L. 241, Crimes | 115 |
| 1917, June 7, P. L. 429, Sec. 2, Intestates | 15 |
| 1917, June 7, P. L. 403, Sec. 21, Wills | 16 |
| 1919, June 30, P. L. 678, Motor Vehicle Act | 366 |
| 1919, June 30, P. L. 521, Sec. 41, Inheritance Taxes | 38 |
| 1921, May 5, P. L. 407, Sec. 20, Liquors | 156 |

ACCORD AND SATISFACTION.**What constitutes**

Where a check marked in full settlement is accepted by plaintiff in a disputed claim such acceptance operates as an accord and satisfaction of such claim. 17.

ACTIONS.**Laches**

A purchaser who buys stock upon certain representations is not guilty of laches when he waits for period to pass to determine truthfulness of representation. 142.

AFFIDAVIT OF DEFENSE.**Motion to strike off**

A motion to strike off part of an affidavit of defense where such defense sounds in tort will be allowed. 47.

Sufficiency of

Where defendant set forth in his affidavit of defense that plaintiff was not a holder for value without notice and that amount of note was not due, it is sufficient to prevent judgment. 99.

Where defendant or an intervenor may have title, their affidavit of defense setting up such title is sufficient to prevent plaintiff from getting judgment. 102.

Where a borough passed an ordinance requiring certain acts to be done by a trolley company, said company's defense that said ordinance was not approved by the Public Service Commission is not good, because ordinance was passed prior to the act and defendant had previously operated under the same. 121.

Where defense alleges certain representations which were not accomplished, it is sufficient to prevent judgment. 142.

Where defendant alleges that action is within statute of frauds and that plaintiff has not observed its provision, while the action itself shows that the Statute of Fraud did not apply, affidavit of defense is not sufficient. 169.

Where defendant sets up that Court does not have jurisdiction in a matter which was controlled by a contract prior to creation of public service commission said defense is not sufficient. 239.

Where the defense goes to that kind of contract entered into, the Court can not enter judgment thereon, but the case is one for a jury. 284.

An affidavit of defense alleging new matter is not a proper defence. 325.

BOROUGHES.**Ordinances**

Where a corporation operates under a borough ordinance they cannot complain thereafter of hardships. 212.

Powers of

A borough has no right to engage in mercantile business and a bailment lease entered into between it and an individual is void. 78.

A borough can not sell electric current in a territory where a competitor has the exclusive right. 78.

BRIDGE.**Court, Jurisdiction of**

It is for the Court in a petition under the Act of Feb. 14, 1907, P. L. 3, to decide whether a proposed bridge is sufficient. 291.

Sufficiency of

Elimination of grade crossing may be required before a bridge may be found to be sufficient. 291.

BUILDING RESTRICTION.**Violation of**

Where building restriction requires under certain conditions a physical connection of garage with the house, a pergola is such physical connection as to fulfill the requirements. 189.

CONTRACT.**Existence of**

Where plaintiff and defendant have a telephone conversation in reference to making a contract and confirmation by letter was requested of defendant. Where such a confirmation is at variance with the alleged terms a contract has not been consummated. 349.

Fulfillment of

Where a paper writing in the nature of a contract is made between husband and wife and she later received something of value for same, the contract is thereby fulfilled. 308.

Rescission of

A rescission is not too late when it is made as soon as allegations were found not to be true. 142.

CONTRIBUTORY NEGLIGENCE.**What constitutes**

Where evidence shows that plaintiff was running his auto at a high rate of speed when accident occurred, that is sufficient for jury to return a verdict for defendant on contributory negligence. 186.

COST.**Remittance of**

It is within the power of the Court to remit costs in a criminal action where prosecutor is shown to have acted in good faith. 115.

COUNTY BRIDGE.**Sufficiency of**

Where the evidence shows that county bridge could be repaired and accommodate the public until such time as a sufficient bridge could be erected by the elimination of grade crossings, such proposed new structure without elimination of grade crossing is not sufficient. 339.

COURT.**Jurisdiction.**

Where an institution is maintained by private benefactors the Court has no jurisdiction to interfere with the operation of the same by writ of mandamus as the relation between student and college is contractual. 49.

DECEDENTS' ESTATE.**Allowance of Claim**

A claim will not be allowed unless there is positive evidence to support same, nor will a compromise of some of the heirs be sufficient to allow claim. 9.

Appraisement, Cost of

The costs of electing to have allowance of \$5000. must be paid out of the estate. 14.

Liability under contract

Unless decedent's representatives order work to discontinue under contract, person performing work under same have right to file a lien. 166.

DESERTION**What constitutes**

An agreement to separate with a subsequent fleeing from jurisdiction because of commission of a crime is not sufficient to establish desertion. 312.

DIVORCE**Desertion**

A jealous disposition on part of respondent is not a sufficient cause to prevent a decree for absolute divorce on ground of desertion. 209.

EJECTMENT**Rule for judgment**

Judgment will not be entered where defendant had at least five years to carry out contract and failed to do so. 144.

Where plaintiff contends that tender has been made but defendant denies such tender, rule for judgment must be dismissed. 203.

Where an executory contract of sale exists and nothing has been done, the facts are for the jury and rule for judgment must be dismissed. 203.

EQUITY.**Appointment of Receiver**

Where defendant is shown to be insolvent the plaintiffs have a right to have receivers appointed. 227.

Demurrer

Where bill alleges pollution of stream of water but does not allege a public nuisance and a demurrer is filed, bill is sufficient to sustain the action because Court is given jurisdiction under Act of 1905. 125.

Injunction

Where building restrictions in a deed refer to streets in the sense of public streets and the violation of the restriction is as to a private street, an injunction will not issue. 189.

Jurisdiction

Equity has jurisdiction in a case where a borough sells electric current, because a borough is not subject to public service commission. 78.

Where rights contained in a deed are interfered with, equity has jurisdiction. 128.

Equity has jurisdiction where defendant was operating under an ordinance passed prior to the passage of act creating Public Service Commission and failed to comply with contract as set forth in ordinance. 245.

Specific performance

Although returns from operations may not be remunerative, yet such fact does not constitute a defense for specific performance of a contract entered into by defendant. 212.

HABEAS CORPUS.**Right to**

Where relator was sentenced for a term of years upon being convicted of certain crime and the sentence imposed was greater than for a first conviction and an application for a writ of Habeas Corpus was filed before the maximum period for which such sentence could have been imposed for a first conviction, such application must be dismissed as premature. 206.

HIGHWAYS.**Intersections**

Where one road ends in another, such roads are intersecting highways within the meaning of the automobile act. 365.

INHERITANCE TAX.**Allowance of deductions**

Where testator in his will provided that executors should not be allowed any commissions, a reasonable compensation is allowed as a deduction for tax purposes. 37.

INJUNCTION**Granting of**

An injunction will not be granted where plaintiff fails to prove his allegations. 69.

Where lessee recovered the right to remove certain improvements an injunction will not issue at the instance of purchaser of lessor. 74.

JUDGMENT.**Motion for**

Where defendant knew of certain alleged objections prior to settlement for his property and failed to press his claim at the settlement, he cannot set up his claim on foreclosure proceedings on a mortgage when interest was in default and judgment must be entered for the full amount. 259.

Opening of

Where judgment was entered on a lease and it was shown that lessor had not required strict compliance with terms of lease and had not given notice to so do, judgment will be opened. 29.

Where one defendant shows that certain false representations were made to secure his signature to a lease, judgment as against him will be opened. 265.

Wife joined in a judgment note with husband and the note was then assigned by the payee and entered. A rule to open said judgment must be granted to determine whether the note was the wife's individual debt or not. 301.

LACHES.**What constitutes**

Where articles were delivered to defendant and one reaches its destination within five days, a lapse of one month and six days after the time of four months within which to make claim, is not a reasonable time and plaintiff is guilty of laches. 160.

LEASE.**Forfeiture of**

A forfeiture of a lease can not take place when a receiver is in possession, as he is an officer of the Court and the rent during his tenure is secured. 29.

LUNATIC.**Adjudication**

A decree appointing a guardian under Act of May 28, 1907, P. L. 292, is not an adjudication of lunacy. 42.

MANDAMUS.**Granting of Writ**

Court has no right to issue a preemptory writ of mandamus where official discretion is vested in the officers of the corporation. 49.

MAYHEM.**What constitutes**

The severance of a finger at a time of conflict is not necessary to constitute mayhem, if it is caused as a result of injuries inflicted at time of conflict it is sufficient. 119.

MECHANICS' LIEN.**Motion to quash writ of Scire Facias**

Writ will not be quashed when a return day fixed by Court as a regular return day for writs was named in said writ. 361.

Rule to strike off

Where contract was made by decedent in her lifetime although work was done subsequent to death and lien filed, rule to strike off will be dismissed. 166.

Motion to strike off

A motion to strike off after a sci fa has been issued and after an affidavit of defense has been filed is too late. 275.

Notice of filing

The notice of intention to file and of filing mechanics lien need not be as specific in detail as required in lien itself, only nature of work is required in notice. 275.

Return day

The Courts have a right to have their regular return days as return days for sci fa sur mechanics liens. 361.

MURDER.**Evidence of**

Where a witness testifies against defendant and after conviction states his evidence was false, notwithstanding the sufficiency of other evidence, the same must be again submitted to a jury on such evidence as would be reliable. 171.

NEW TRIAL.**Granting of**

A new trial will not be granted when evidence was left to jury with proper instructions. 89.

A new trial will not be granted where the evidence was to the effect that the plaintiff was guilty of contributory negligence. 95.

Granting of new trials is at the discretion of the Court and even though evidence might have been sufficient to sustain a conviction without that of which a witness who stated his testimony was not true, yet that might have been the controlling evidence leading to conviction and a new trial must be granted. 171.

Where evidence submitted to jury would justify verdict reached, a new trial will not be granted. 186.

Where there has been no compliance with requirements of Sales Act and verdict was directed to be given for defendant, no new trial will be granted. 349.

NON-SUIT.**Motion to take off**

Where plaintiff fails to show in action for slander a conspiracy between defendants and also failed to follow proper course open to him, non-suit will not be taken off. 252.

NOTICE.**Sufficiency of**

Where express receipt requires written notice of loss within four months after reasonable time for delivery and the same is not made sufficient if not committed to writing within a reasonable time, a verbal notice is not sufficient. 160.

PARTIES.**Right to intervene**

A mortgagee has such interest in property as to entitle him to intervene as a party defendant in a sci fa sur mechanics lien. 284.

Citizens of a district have no right to intervene in an action on part of a corporation for a surrender of part of its franchise, because they have no rights which are directly affected by the decree. 321.

A second mortgagee has a right to intervene as party plaintiff on a foreclosure proceedings on first mortgage against defendant. 327.

PARTNERSHIP.**Proof of**

Where plaintiff claims to be a partner of defendant and his own testimony in other actions show that he disclaimed any interest in the alleged partnership, he cannot then sustain his contention and judgment on his claim for his share must be entered in favor of defendant. 268.

PUBLIC SERVICE COMMISSION.**Jurisdiction**

See Equity—Jurisdiction. 245.

The Public Service Commission does not have jurisdiction in an action on a contract for work done under a borough ordinance passed prior to creation of commission. 239.

REPAIRS.**Lien for**

There is no lien on car for repairs unless ordered by owner. 140.

REPLEVIN.**Motion to quash writ**

Where officer of the law takes personal property and holds same for purpose of evidence, it is not the subject of replevin. 155.

Rule for judgment

Where work was done on auto under lease and lessor has not ordered work, car cannot be held for repairs made at lessee's direction. 140.

Title to property

In an action of replevin the defendant must establish his title and cannot rely on weakness of plaintiffs' title to prove his. 223.

RESULTING TRUST.**Existence of**

Where the evidence shows that plaintiff has not done anything toward constructing a building, a resulting trust does not exist in his favor. 355.

SCHOOL DIRECTORS.**Removal of**

School Directors cannot be removed from office because of certain action on their part which was entirely within their discretion. 163.

STREETS.**Right in**

Where deed gave grantee free and common use of a private road, a grantee of another portion of large tract can not shut out any grantee from such use even if such road is not necessary for an exit to public road. 128.

TESTAMENTARY GUARDIAN**Powers of**

Testamentary guardians are entitled to have control of estates of minors subject, however, to such orders and decrees as the Orphans' Court may make. 26.

TRUST.**Creation of**

Where a son takes title to real estate from his father and pays a fair consideration for the same and no other stipulation is named, the son does not hold in trust for his father. 314.

Kind of

Where decedent directs trustee under her will to set aside a fund the income of which was to be used for certain purposes. The setting aside of such a fund is a duty imposed on trustee and trust is an active one. 150.

Resulting

In order to establish a resulting trust, fraud must be shown. 144.

WILLS**Interpretation of**

Where a will gave remainder interest at death of life tenant to brothers and sisters or children of any deceased brothers and sisters, such designation will not entitle grandchildren of any deceased brothers and sisters to participate. 22.

Where B died and left estate to C for life and at her death to heirs of brother's children would take irrespective of whether parents were living. 104.

Where decedent limited a portion of his estate to a daughter and does not as to a son, it is clearly the intention of decedent that son was to get his absolutely. 108.

Revocation of

When decedent gave wife a paper writing of a testamentary character and later makes a will, which will was made with wife's knowledge, the last will revoked the paper writing. 308.

WITNESS.**Competency of**

A husband is a competent witness where wife had a guardian appointed under the Act of May 28, 1907, P. L. 292, in a suit for divorce on ground of cruel and barbarous treatment. 42.

